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PREFACE.

The following collection of cases has been prepared, at the request of several leading educators, to accompany the writer's treatise on the law of agency, the purpose being to illustrate the text by object lessons gathered from the reports. Nothing in the way of annotation has been attempted, beyond an occasional reference to similar cases, as it is thought that the text of the treatise supplies all that is needed in that direction. To make a selection of cases from the great number upon the subject is a difficult task and one in reference to which opinions will necessarily differ. The attempt here has been to select such as contained clear statements of the principles or furnished striking illustrations of them, and were not too much involved with other matters or too long for reproduction. Some cases which might otherwise have appeared have been omitted because the substance of them has been sufficiently stated in the text or notes of the treatise. In many cases matters irrelevant to this subject have been omitted. Cases on the law of master and servant have also been omitted, as they sufficiently appear in other available collections. Many of the cases given are too recent to constitute what may be termed leading cases, nor has there been any attempt to include all that might properly be so designated. As the volume is intended primarily for the use of students, for whom the making of their own abstracts is a most valuable exercise, the cases are printed without head notes. It is believed, however, that they will be thereby rendered no less useful to others who may desire to consult them, as a full index furnishes a ready guide to their contents.

Acknowledgments are especially due to Professor Francis M. Burdick, of Columbia College, who kindly volunteered to furnish a list of the cases used by him in that institution.

F. R. M.

University of Michigan,
Ann Arbor, October 1, 1893.

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CASES ON AGENCY,

ARRANGED ACCORDING TO THE CLASSIFICATION OF MECHEM ON AGENCY.

CASES ON AGENCY.

BOOK I.

OF THE RELATION IN GENERAL: HOW CREATED AND TERMINATED.

CHAPTER I.

DEFINITIONS AND DIVISIONS.

RELATION OF AGENCY TO SERVICE.

(Dearsly and Bell, Crown Cases, 600.)

REGINA vs. WALKER.

(English Court of Criminal Appeal, May, 1858.)

The prisoner was convicted of embezzlement under a statute, as a servant, and the case was made out if the prisoner was shown to have been a servant within the statute.

The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders for their manures, which they supplied from their stores. The prisoner was to collect the money and pay it at once to them, and was also to send a weekly account. He was called agent for the B. district. He was to go through the county, see the farmers

and get orders, and was to be continually during the season among the farmers. Subsequently the prosecutors sent large quantities of manure to stores at B., which were under the control of the prisoner, who took them in his own name and paid the rent to the owner, but was repaid such rent by the prosecutors when the accounts were adjusted. The prisoner supplied the manure from these stores; but it did not appear that the former mode might not have been resumed if thought desirable. The prisoner signed a proposal to a guarantee society to insure the prosecutors, which stated that his salary was £1 per annum, besides a commission which was estimated at £65 per annum, and it was proved that the prosecutors had agreed to pay the salary of £1 per annum. Having appropriated money received from customers, the prisoner fraudulently returned their names as the names of persons who had not paid.

The case was argued before POLLOCK, C. B., WIGHTMAN, J., WILLES, J., BRAMWELL, B., and BYLES, J.

Giffard appeared for the Crown and *M'Intyre* for the prisoner.

M'Intyre: I submit that the prisoner was not a servant within the statute. The evidence rather shows that he was a factor. To have been a servant, the prisoner must have been bound to obey the commands of his employers, which he clearly was not. The prisoner took the stores, and though he was afterwards reimbursed by the prosecutors, the stores were under his control, and from these stores he supplied the goods. The goods were supplied to him by the prosecutors, with whom he opened an account, and he supplied the goods to whom he liked. He was not bound to give any definite amount of time or labor, nor was he bound, as a servant is, to obey any particular order. He had other business of his own to attend to, and throughout the whole matter he was treated as an agent and not as a servant.

WILLES, J., referred to *Regina vs. Bailey*, Dearsly & Bell, 121.

M'Intyre: That case was not argued for the prisoner, and in *Regina vs. Goodbury*, 8 Car. & P. 665, PARKE, B., said he was of opinion that a man could not be the servant of several persons at the same time, but was rather in the character of an agent; and, referring to *Rex vs. Carr*, Russ. & Ry. 198, in which a contrary doctrine had been held, his lordship said he wished to have that question further considered by the judges.

The salary of £1 a year was merely a colorable thing in order to get security from the guarantee society. It is the case of a

commission agent, and the prisoner is styled an agent, and treated as a debtor and not as a servant.

Giffard: In one sense no doubt the prisoner was an agent, but he was also a servant within the meaning of the statute. It is not necessary, to constitute a man a servant, that he should be under an obligation to obey every lawful command of the master.

POLLOCK, C. B.: As, to clean his boots.

Giffard: The prisoner's duty was to collect orders, receive money, and pay the money over at once to the prosecutors.

WIGHTMAN, J.: Every factor does that.

Giffard: Every factor may, but he is not compelled to do so.

WIGHTMAN, J.: Was the prisoner bound to get orders?

Giffard: Perhaps not; but in *Rex vs. Carr, supra,* a person employed upon commission to travel for orders and collect debts was held to be a clerk within the 39 Geo. III. c. 85, although he was employed by many different houses upon each journey and paid his own expenses out of his commission, and did not live with any of his employers, nor act in any of their counting houses.

WIGHTMAN, J.: Suppose a publican employed for purposes of this kind, would he be a servant?

Giffard: He might or might not, according to the facts. The mode of remuneration, whether by salary or otherwise, is no test, *Regina vs. Wortley,* 2 Den. C. C. 33; no exact line can be drawn, and no inflexible rule can be laid down; each case must depend upon its own facts. The case of a commercial traveller is similar to this; such a traveller has been held to be a servant within the statute, and the duties of the prisoner are not distinguishable from his. He, like the prisoner, is employed to obtain orders, and is bound to furnish accounts.

BYLES, J.: So is a factor; the law implies that contract for him.

POLLOCK, C. B.: What is the difference between a servant and an agent?

Giffard: Every servant is an agent, although every agent may not be a servant. The parties were at liberty to contract that the relation of master and servant should exist between them, and they did so contract. By the alteration made in the terms between the prosecutors and the prisoner a new contract was created, and a salary was agreed upon.

WIGHTMAN, J.: The salary was obviously only for the purpose of getting the insurance effected.

Giffard: Nor was it necessary in order to create the relation of master and servant. In *Rex vs. Ward,* 8 Carr. & P. 154, it was held that an extra collector of poor rates, whose remuneration was paid out of the parish fund by a per centage on his collections, was a servant or clerk within the meaning of the statute 39 Geo. III. c. 85; and *Regina vs. Callaghan,* Gow. N. P. Cas. 168, also shows that a narrow construction must not be put upon the words "clerk or servant."

The question is whether it was impossible to say, upon this evidence, that the prisoner was a servant. Unless it was, the conviction must be supported, for the question was left by the judge on the trial to the jury, and they found that the prisoner was a servant. The objection that he could not be servant to more than one person is answered by the decision in *Regina vs. Bailey,* Dearsly & Bell, 121.

M'Intyre (in reply): In *Regina vs. Wortley* there was a direct and distinct contract to serve as "bailiff," and that case is therefore entirely distinguishable from the present. The great distinction between this case and all the cases cited is, that the prisoner had the entire authority over the goods, which were under his control, and this makes him a factor and not a servant. *Cur. adv. vult.*

The judgment of the court was delivered, on the 1st of May, 1858, by POLLOCK, C. B.: We are of opinion that the evidence in this case did not establish that the prisoner was the servant of the prosecutors, and that the relation shown to have existed between them was rather that of principal and agent. We therefore think this conviction must be quashed.

Conviction quashed.

(90 NEW YORK, 213.)

WAKEFIELD vs. FARGO.

(New York Court of Appeals, October, 1882.)

Action brought to enforce the claim of an alleged laborer or servant of The High Rock Congress Spring Company, a corporation, against defendant as a stockholder in said corporation, said action being based upon the statute mentioned in the opinion.

Chas. S. Lester, for appellant.

Matthew Hale, for respondent.

DANFORTH, J. We agree with the General Term in the conclusion that The High Rock Congress Spring Company was organized under the act of 1863, chapter 63, entitled "An act to extend the operation and effect of the act passed February 17, 1848, entitled 'An act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes;'" and that by the provisions of section 2, the stockholders composing it became subject to the liabilities imposed by section 18 of the original act, and therefore "liable for all debts that may be due and owing to their laborers, servants and apprentices for services performed for such corporation."

We also agree with that court in the opinion that the appellant Judson, was, as between himself and the creditors of the corporation, a stockholder, and so within the purview of that section. He held the certificate of stock, and the books of the company disclosed this to be his relation to it. By admissions in the pleadings, the other appellants occupy the same position. But there is error in the judgment to the extent of the "Clark" claim. He was not, within the meaning of the act, a "laborer, servant or apprentice." It is true he is characterized in the findings, in general terms, as both "laborer" and "servant," but specifically is described as the bookkeeper and general manager of the company, and his duties accord therewith. He kept an account of all the receipts and disbursements of the company, and, in the absence of the superintendent, had the charge and control of its business. He "worked by the year," was employed at a yearly salary of $1,200, and it is an indebtedness so created which has been allowed in this action.

A stockholder is not liable for the general debts of a corporation, if the statute creating it has been complied with. The clause in question creates a privileged class, into which none but the humblest employés are admitted, and the distinction which in practical life is easily discernable between president, director, officer, agent and laborer, at once disappears in the face of such a judgment as we have before us. Clearly a distinction is made by the statute. The stockholder must pay, not debts due to all employés of the company, but those due to "laborers, servants and apprentices," and not all debts due to them, but only such as are due for "services" performed for such corporation. It is plain we think, that the services referred to are menial or manual

services,—that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence; one who is responsible for no independent action, but who does a day's work, or a stated job under the direction of a superior (*Gordon vs. Jennings*, L. R. 9 Q. B. Div. 45; *Dean vs. DeWolf*, 16 Hun, 186, affirmed, 82 N. Y. 626). Such persons are described in the common law, in terms adopted, as is reasonable to suppose, in the statute before us. Speaking of master and servant, Blackstone (B. 1, chap. 14) says: "The first sort of servants acknowledged by the law of England are menial servants. Another species of servants are called apprentices. A third species of servants are laborers, who are only hired by the day or the week." He also speaks of "stewards, factors, and baliffs," as perhaps constituting a fourth class. But this, doubtingly, "because they serve in a superior, ministerial capacity," and in view of the declarations already made by this court as to the object of the statute (*Coffin vs. Reynolds*, 37 N. Y. 640; *Gurney et al. vs. Atlantic & Great Western Railway Co. et al.*, 58 Id. 358; *Akin, Administrator vs. Wasson*, 24 Id. 482; *Stryker vs. Cassidy*, 76 Id. 50, 32 Am. Rep. 262), it may be added that as such individuals occupy positions, and are usually of such capacity as enables them to look out for themselves, they are not within the privilege of the statute. To the language of the act must be applied the rule common in the construction of statutes, that when two or more words of analogous meaning are coupled together, they are understood to be used in their cognate sense, express the same relations, and give color and expression to each other. Therefore, although the word "servant" is general, it must be limited by the more specific ones, "laborer and apprentice" with which it is associated, and be held to comprehend only persons performing the same kind of service that is due from the others. It would violate this rule to hold that the intermediate, or second class, represented a higher grade than the class first named.

A general manager is not *ejusdem generis* with an apprentice or laborer; and although in one sense he may render most valuable services to the corporation, he would not in popular language be deemed a servant. The word used is no doubt broad enough, and might without exaggeration, represent all persons connected with the administration or furtherance of the affairs of a corporation; in

this instance, from the one who dips or bottles the water, to the president, but this would manifestly be too general. "Laborer or apprentice" are words of limited meaning, and refer to a particular class of persons employed for a defined and low grade of service performed, as before suggested, without responsibility for the acts of others, themselves directed to the accomplishment of an appointed task under the supervision of another. They necessarily exclude persons of higher dignity, and require that one who seeks his pay as servant, should be of no higher grade than those enumerated as laborers or of lesser quality. A statute which treats of persons of an inferior rank cannot by any general words be so extended as to embrace a superior; the class first mentioned is to be taken as the most comprehensive, "*specialia generalibus derogant.*" (Blackstone's Intro. section 3; *Sandiman vs. Breach,* 7 B. & C. 96; *Reg. vs. Cleworth,* 4 B. & S. 927; *Kitchen vs. Shaw,* 6 A. & E. 729; *Branwell vs. Penneck,* 7 B. & C. 536; *Williams vs. Golding,* L. R. 1 C. P. 69; Broom's Maxims, 625; *Smith vs. People,* 47 N. Y. 337. Allen, J.)

The decisions already made by us and above cited also seem to exclude the claim in question. No two cases are alike, but the principle on which the ones referred to were decided, control here. On the other hand the respondent brings to our attention *Hovey vs. Ten Broeck,* 3 Rob. 316, where a conclusion was reached that the plaintiff "a man of all work," who had a complete supervision of the property, men and business of the company, who also kept their books, and was to receive for his services, at the rate of $500 per annum, was as to some matters a laborer, and others a servant, upon the ground that as laborer he performed manual work, and at other times as "servant" rose above it; when he did that we think he went beyond the statute. The word "servant" must be construed by its associates. It stands between "laborer" and "apprentice," and can represent no higher degree of employment. In *Kincaid vs. Dwinelle,* 59 N. Y. 548, also cited, the question was not presented.

The claim of Clark was improperly allowed.

(132 UNITED STATES, 518.)

SINGER MANUFACTURING COMPANY vs. RAHN.

(Supreme Court of the United States, December, 1889.)

This was an action brought by Rahn against the company to recover damages for a personal injury which the plaintiff sustained by reason of the careless driving of a horse and wagon by one Corbett, who was alleged to be the servant of the defendant, and engaged in its business. The defendant denied that Corbett was its servant, but alleged that he was engaged in selling sewing machines of the defendant's manufacture on commission, and was an independent contractor. The defendant put in evidence the contract under which Corbett was at work, the terms of which sufficiently appear from the opinion.

Grosvenor Lowry and *Jos. S. Auerbach*, for plaintiff in error.

W. P. Clough, *John W. Willis*, and *Chas. A. Ebert*, for defendant in error.

GRAY, J. The general rules that must govern this case are undisputed, and the only controversy is as to their application to the contract between the defendant company and Corbett, the driver, by whose negligence the plaintiff was injured.

A master is liable to third persons injured by negligent acts done by his servant in the course of his employment, although the master did not authorize or know of the servant's act or neglect, or even if he disapproved or forbade it. *Philadelphia & Reading Railroad vs. Derby*, 14 How. (U. S.) 468, 486. And the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, "not only what shall be done but how it shall be done." *Railroad Co. vs. Hanning*, 15 Wall. (U. S.) 649, 656.

The contract between the defendant and Corbett, upon the construction and effect of which this case turns, is entitled "Canvasser's Salary and Commission Contract." The compensation to be paid by the company to Corbett, for selling its machines, consisting of "a selling commission" on the price of machines sold by him, and "a collecting commission" on the sums collected of the purchasers, is uniformly and repeatedly spoken of as made for

his "services." The company may discharge him by terminating the contract at any time, whereas he can terminate it only upon ten days' notice. The company is to furnish him with a wagon; and the horse and harness to be furnished by him are "to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business."

But what is more significant, Corbett "agrees to give his exclusive time and best energies to said business," and is to forfeit all his commissions under the contract, if, while it is in force, he sells any machines other than those furnished to him by the company, and he "further agrees to employ himself under the direction of the said Singer Manufacturing Company, and under such rules and instructions as it or its manager at Minneapolis shall prescribe."

In short, Corbett, for the commissions to be paid him, agrees to give his whole time and services to the business of the company; and the company reserves to itself the right of prescribing and regulating not only what business he shall do, but the manner in which he shall do it; and might, if it saw fit, instruct him what route to take, or even at what speed to drive.

The provision of the contract, that Corbett shall not use the name of the company in any manner whereby the public or any individual may be led to believe that it is responsible for his actions, does not and cannot affect its responsibility to third persons injured by his negligence in the course of his employment.

The circuit court therefore rightly held that Corbett was the defendant's servant, for whose negligence in the course of his employment, the defendant was responsible to the plaintiff. *Railroad Co. vs. Hanning*, above cited; *Linnehan vs. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Regina vs. Turner*, 11 Cox Crim. Cas. 551.

Affirmed.

(16 LAW REPORTS, IRELAND, 225.)

WILSON vs. OWENS.

(Irish Exchequer Division, May, 1885.)

Owens was a shop-keeper who kept a pony and trap for his domestic use. He kept a man McNally who usually drove the pony. In his shop he had a clerk Egan. While Owens was absent

in England, his brother-in-law Quinn came to his house for a visit. When Quinn left he had McNally get up the pony and trap and then had Egan drive him to the railway station. On the way back, Egan drove into plaintiff's carriage and did serious injury. Action to hold Owens liable.

Boyd, Q. C., and *Keogh*, for plaintiff.

Atkinson, Q.C., with *Houston, Q.C.*, and *Sandford*, for defendant.

DOWSE, B. (After stating the facts.) The question simply is, were there any facts proved upon which the jury could reasonably and legitimately find the defendant guilty of negligence by himself or his servant? There is no difference between the parties as to the law as laid down in the decisions cited before us. That law is plainly written. "He runs that readeth it." The only difficulty is as to the application of the law to this particular case. We have been referred to the cases of *Goodman vs. Kennell*, 3 C. & P. 167; *Joel vs. Morison*, 6 C. & P. 501; *Patten vs. Rea*, 2 C. B. (N. S.) 606, and *Storey vs. Ashton*, L. R. 4 Q. B. 476. The same law is stated at greater length in the judgment of Coleridge, C. J., in *Rayner vs. Mitchell*, 2 C. P. Div. 357. There is also a case of *Cormack vs. Digby*, I. R. 9 C. L. 557—a decision of this court—in which we recognize and apply the well-settled rule of law governing cases of this description. The rule of law in its application is founded upon the answer to be given to any of the following questions: Had the servant implied authority to do the act, in the doing of which the injury was occasioned? Did the master impliedly sanction the act? Was the act done with the defendant's authority and in the course of the servant's business as defendant's servant? In *Storey vs. Ashton*, COCKBURN, C. J., says: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant." There is no material difference whether the party committing the injury is a servant or agent of the defendant. A servant is an agent. The principal is responsible for the acts of his agent, and this case is only an application of the doctrine of respondeat superior. That this is the law is beyond all dispute. * * * It was admitted by Mr. Boyd during the trial that Quinn was not a servant or agent of the defendant, and therefore that he had no authority from the defendant to take out the trap. His act could not therefore bind the defendant. As regards Egan, I might be of a different opinion

about the defendant's liability if Egan was in the habit of driving the trap, or had ever driven it himself to defendant's knowledge. On this occasion it was not Egan who ordered out the vehicle. What would have been Owen's liability if the accident had happened when Quinn was in the trap? There was no evidence that Egan had any authority from the defendant to drive himself. McNally was the man left in charge of the vehicle, and McNally was the man who always drove the defendant when at home. Why should he not have done so when defendant was absent? The case would have been very different if this accident had happened when McNally was, according to his known custom, driving the trap. Take the case of a gentleman who goes away from home, leaving a house steward, a housekeeper, an ordinary servant, or a butler, in charge of his establishment, and leaving his horse and car in the care of his coachman or groom, does that give the person in charge of the house authority to drive the horse and car in his master's absence? And if an accident happens through the negligent driving of this person, am I to be told that the master is to be liable for that? I cannot agree in an application of the law which would hold the master liable in such a case. There is nothing in the evidence reasonably to show that Egan ever received authority from Owens to do what he did. I am very reluctant to be bound to differ from the Chief Baron, but under all the circumstances I think the verdict ought to have been directed for the defendant, on the simple ground that there was no evidence proper to be submitted to the jury that Egan was the defendant's servant, so as to bind him by his acts when the accident happened.

CHAPTER II.

FOR WHAT PURPOSES AN AGENCY MAY BE CREATED.

(113 MASSACHUSETTS, 133, 18 AM. REP. 459.)

RICE vs. WOOD.

(Supreme Judicial Court of Massachusetts, September, 1873.)

Action in contract to recover commissions as a broker. Defendant requested the court to charge that a broker acting for both parties cannot recover commissions from either, unless both knew of and assented to his double agency. The court, however, charged that he could recover from the party who had knowledge of it. Plaintiff recovered and defendant alleged exceptions.

F. T. Blackmer, for defendant.

W. A. Gile and *C. A. Merrill,* for plaintiffs.

DEVENS, J. In this case there was evidence at the trial in the court below that the plaintiffs had been employed by a third person, who had promised to pay them a commission therefor, to dispose of certain real estate, and that afterward, without the knowledge of such person, an agreement was made between the plaintiffs and the defendant, by which the plaintiffs were employed to act for the defendant in the exchange of certain stocks held by him for real estate, and were promised a commission if such exchange should be effected, the defendant knowing at the time that the plaintiffs were employed for a commission to sell such real estate; and further, that afterward the plaintiffs introduced the defendant to the owner of such real estate and by the instrumentality of the plaintiffs the exchange of defendant's stock for such real estate was effected.

If this were an action by the plaintiffs against the owner of the real estate, for commissions earned in disposing thereof, the decision of this court in *Farnsworth vs. Hemmer,* 1 Allen (Mass.) 494, would be exclusive against the claim, upon the ground that the plaintiffs, if such facts should be proved, had entered into a relation inconsistent with the confidence reposed in them by such owner,

and placed themselves in a position antagonistic to his interests. This case presents, however, the question whether, conceding that the plaintiffs could not recover their commissions from the owner of the real estate, they may not recover those they claim to be entitled to from the defendant, as he knew fully, at the time of entering into his contract, the relation in which the plaintiffs stood to the third party. It was the duty of the plaintiffs to get the highest price for the real estate that could be obtained for it in the market; while the contract between the plaintiffs and the defendant was an inducement to the plaintiffs to effect a sale to the defendant, even if it was on lower terms than might have been obtained from others, because they thereby secured their commissions from both parties. It was therefore an agreement which placed the plaintiffs under the temptation to deal unjustly with the owner of the real estate. *Walker vs. Osgood,* 98 Mass. 348. Contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency. *Fuller vs. Dame,* 18 Pick. (Mass.) 472. We are of opinion, therefore, that the judge who presided at the trial erred in the instruction given, and that the defendant was entitled to an instruction substantially like that asked for. Nor can the ruling be sustained upon the ground suggested at the bar, that the plaint-

iffs were middle-men only, bringing the parties together and doing nothing further, the parties themselves making the contract. In *Rupp vs. Sampson*, 16 Gray (Mass.) 398, the plaintiff was permitted to recover, not for services rendered to the defendant as a broker, but for the performance of a certain specific act, namely, the introduction of the other party to him, the parties after such introduction making their own contract.[1] It was there held that this was not such a fraud upon the other party, who also paid for the service of the plaintiff in introducing him, although concealed from such party, as to make the contract of the plaintiff with the defendant void for illegality. That, however, is not the present case.

It here appears, by the bill of exceptions, not only that there was evidence that the plaintiffs introduced the parties, but that, through the instrumentality of the plaintiffs, the exchange was effected, and that in effecting such exchange the plaintiffs acted as brokers for both parties. It is to be observed also, that both the instructions asked for by the defendant and those given by the presiding judge proceed upon the ground that the plaintiffs were brokers and not middle-men only.

Exceptions sustained.

(75 MISSOURI, 100, 42 AM. REP. 385.)

ATLEE vs. FINK.

(Supreme Court of Missouri, October, 1881.)

Action on account. The opinion states the facts. Defendant had judgment below.

Tomlinson & Ross, for appellant.

J. D. S. Cook, for respondent.

HENRY, J. Plaintiffs sued defendant for balance on account for lumber sold, $497.68. In his answer, defendant admits the purchase, but his defense is, that there is in the account an overcharge of $35, that he is entitled to a credit of $184.36 paid on the account and that plaintiffs owe him $261, as commission on lumber sold by plaintiffs to defendant's employers, on defendant's recommendation, for which he alleges plaintiffs agreed to pay

[1] See *Ranney v. Donovan*, 78 Mich. 318, to same effect.

him a commission of two and one-half per cent. All of these allegations were denied by plaintiffs' replication. The defendant obtained a judgment for $38.73, from which plaintiffs appeal.

The evidence shows that plaintiffs resided at Fort Madison, Iowa, and were engaged in manufacturing and selling lumber; that they established a branch of their business at Kansas City, Missouri, and placed J. O'Sullivan in charge of it, to sell lumber. O'Sullivan testifies that he was employed by plaintiffs to sell their lumber. Samuel Atlee, one of plaintiffs, testifies that O'Sullivan was not authorized to make any agreement to pay commissions to other persons for selling their lumber. The firm paid O'Sullivan a salary of $1,800 per annum. The defendant, Fink, testifies that he, O'Sullivan and W. H. Atlee (who was not a member of the firm of plaintiffs), were together when O'Sullivan and defendant made the agreement by which the latter was to receive the commission on sales O'Sullivan might make to defendant's employers through defendant's influence with them; that his employers paid him for superintending the erection of the various buildings erected by them, and it was his duty to keep the laborers at work, and see about materials and all details; that his employers would pay no bills for labor or lumber until certified by defendant to be correct; that he never informed them or any of them that he was to get a commission on the lumber purchased by them of plaintiffs. This is the substance of the testimony on the only branch of the case which we deem it necessary to consider.

O'Sullivan was not expressly, or by the nature of his employment, authorized to make the contract in question. He was, as he testified, but an agent to sell, and could not delegate that authority to another. Especially was he not authorized to promise a compensation for sales made for the firm by others, which would bind the firm. Story on Agency (6th. ed.), sec. 387; *Warner vs. Martin*, 11 How. (U. S.) 209.

But it is unnecessary to extend our remarks on that proposition, because if O'Sullivan had had ample authority to make such a contract, it is contrary to public policy to allow the plaintiffs to recover on it. Fink was employed by others to transact business for them, and they paid no bills for lumber not certified by him to be correct, and for two and one-half per cent. commission on sales to his employees, he sold his influence with them to the plaintiffs. He kept them in ignorance of the agreement he had made with O'Sullivan. That agreement was a temptation to him to certify

as correct bills for lumber which might be incorrect, both as to the amount of lumber and the prices charged. His compensation could be increased by such conduct, and it is no answer that nothing of the kind occurred. In *Fuller vs. Dame,* 18 Pick. (Mass.) 472, the court said: "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the right and interests of third persons." In *Spinks vs. Davis,* 32 Miss. 152, the court said: "It is a sufficient objection to a contract on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties." One employed by another to transact business for him has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer. The interests of the defendant's employers and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests. It makes no difference that defendant was not employed to purchase the lumber for his employers. It is enough that it was his duty, under his employment, to examine and certify to the correctness of the lumber bills.

Under this view, it is wholly immaterial whether the agreement made by O'Sullivan with the defendant was ratified or not by the plaintiffs. The ratification of the contract would not have eliminated the element which rendered it invalid. The trial court entertained a different view of the subject, and embodied, in instructions given, that erroneous view, and refused instructions asked by plaintiffs which declared the law as herein announced, and its judgment is therefore reversed and the cause remanded.

Reversed and remanded.

NOTE.—See also *Smith vs. Sorby,* L. R. 3 Q. B. Div., 552, 28 Moak's Eng. Rep. 455; *Harrington vs. Victoria Graving Dock Co.,* L. R. 3 Q. B. Div., 549, 28 Eng. Rep. 453.

(40 NEW YORK, 543,100 AM. DEC. 535.)

MILLS vs. MILLS.

(Court of Appeals of New York, June, 1869.)

Action for the specific performance of a contract to convey certain real estate, brought by William T. Mills against David S. Mills. The court below dismissed the complaint upon the ground that the contract relied upon was illegal and void. Plaintiff appeals.

Samuel D. Morris, for appellant.

Albert Mathews, for respondent.

By the Court, HUNT, C. J. The question of the effect of agreements of this character has been recently considered in this court: *Lyon vs. Mitchell,* 36 N. Y. 235, 93 Am. Dec. 502; see also the dissenting opinion of Judge Grover at page 682. The agreement in question is founded upon an undertaking on the part of the plaintiff, reciting that a bill was pending in the Senate, which granted unto the plaintiff a certain railroad franchise in the city of Brooklyn, and promising "to give all the aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertions to procure the passage into a law of the bill heretofore introduced into the Senate of the State of New York." It was further agreed that the said bill should be so amended as to limit the grant therein to the parties to this agreement; or that it should be amended as, from time to time, should be agreed by the said parties and, when passed, the right should be transferred to David S. The plaintiff further agreed that he would not "co-operate or conspire" with any other person, or give any aid or countenance to the introduction into the legislature by any other person of a similar proposition.

It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate, and which right or debt he proposed to transfer to the defendant. He had simply asked of the legislature the privilege or favor to be granted to him of building and operating a railroad upon certain streets of the city of Brooklyn. This privilege may

be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper and corrupt tampering with legislative action. See *Lyon vs. Mitchell, supra,* and cases cited; see, also, *Fuller vs. Dame,* 18 Pick. (Mass.) 479; *Sedgwick vs. Staunton,* 14 N. Y. 289; *Frost vs. Belmont,* 6 Allen (Mass.), 159; *Powers vs. Skinner,* 34 Vt. 281, 80 Am. Dec. 677. It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action. *Clippinger vs. Hepbaugh,* 5 Watts & S. (Penn.) 315, 40 Am. Dec. 519; *Fuller vs. Dame, supra.*

The case was correctly decided, and the judgment should be affirmed.

NOTE.—See, also, *Marshall vs. Railroad Co.,* 16 How. (U. S.) 314; *Trist vs. Child,* 21 Wall (U. S.) 441; *Weed vs. Black,* 2 McAr. (D. C.) 268, 29 Am. Rep. 618; *McBratney vs. Chandler,* 22 Kans. 692; *Railway Co. vs. Railway Co.,* 75 Wis. 224.

(98 INDIANA, 238, 49 AM. REP. 746.)

ELKHART COUNTY LODGE vs. CRARY.

(Supreme Court of Indiana, May, 1884.)

The owners of land in a city agreed with the owners of an adjacent building that if the latter would offer that building to the government for a postoffice for a nominal rent for ten years, and use all "proper persuasion" to secure its acceptance, they would pay them a certain sum annually for that period, in case of the government's acceptance. The building was accepted by the government, one of the owners, a personal friend of the postmaster-general, truthfully representing that the situation was suitable, and notes were given by the defendants for the annual installments as agreed.

The action was upon the notes so given. Defendant had judgment below.

A. D. Wilson, J. H. Baker and *J. A. S. Mitchell,* for appellants.

W. L. Stonex, for appellee.

ELLIOTT, C. J. (After stating the facts): The material deduction of fact from these subsidary facts is that the parties formed a combination for the purpose of securing the location of a public office, and as part of the plan the appellants undertook that certain individuals of their number should use their influence with the government officers to effect the purpose of the combination, and that the agreement to pay for such services was contingent upon the success of the scheme.

It has long been established that a contract against public policy will not be enforced. This principle is firmly fixed and has often been applied to contracts. There can therefore be no doubt as to the existence of the rule; the only question is as to its applicability to the facts of this case.

Where the general public has an interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy and not enforceable. There are very many cases holding that an agreement to locate a railroad station at a designated place in not enforceable because against public policy. *St. Louis, etc., R. R. Co. vs. Mathers,* 104 Ill. 257; *Williamson vs. Chicago, etc., R. R. Co.,* 53 Iowa, 126, 36 Am. Rep. 206; vide authorities, n. 214. The principle upon which these cases proceed is that the public good, and not private interest, should control in the location of railroad depots, and this principle certainly applies with full force to an office of a purely public character, such as a postoffice. We find in these railroad cases, and there are very many of them, a principle which supplies a rule governing such a case as the present. It is true that there is some difference in the views of the courts upon the question whether an agreement for the location of a depot is valid when it does not restrict the location to the place named, and no other, but upon the general principle there is entire harmony. In the present case this difference in the opinions of the courts is an unimportant consideration, for here the location is restricted to one place and no other, for a period of ten years, and the case therefor falls within the holding of the cases most favorable to the appellants. We say that the location is restricted to one place for the reason that it is

a matter of judicial knowledge that but one postoffice can be located in the city of Goshen. While the cases of which we have spoken establish a principle which rules this case, there are others which in their general features more nearly resemble the one at bar. Closely analogous in principle are those cases which hold that contracts which may tend to the injury of the public service are void. *Card vs. Hope*, 2 B. & C. 661; *Wells vs. Foster*, 8 M. & W. 149. *Blackford vs. Preston*, 8 T. R. 89; *Tool Co. vs. Norris*, 2 Wall; (U. S.) 45; *Ashburner vs. Parish*, 81 Penn. St. 52.

There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject, for we think it quite clear that a contract which is made for the purpose of securing the location of an important office connected with the public service, for individual benefit, rather than for the public good, tends to the injury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. Pollock, Prin. Cont. 279; Anson, Cont. 175; 1 Whart. Cont. secs. 402 to 414, inclusive. A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. This rule is recognized in our own case of *Maguire vs. Smock*, 42 Ind. 1, 13 Am. Rep. 353, where it was held that an agreement to pay a consideration to a property owner for signing a petition to secure the improvement of a street was void, although there was no fraud, and although the person to whom the promise was made was really in favor of the improvement.

It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was in fact done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. An English author says: "But an agreement which has an apparent tendency that way, though an inten-

tion to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void." Pollock, Prin. Cont. 286. In the case of *Tool Co. vs. Norris, supra,* the court said: "All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation by refusing them recognition in any of the courts of the country."

The case in hand is plainly distinguishable from those in which a promise is made to the public through its representatives. Here the motive of the contracting parties was to secure the location of a public office to advance their private interests, and not to benefit the public, and here too there was competion between two localities. The case therefore is one in which there should have been no influence brought to bear upon the decision of the contest except that of the public good.

The cases of *Peirce vs. Ruley,* 5 Ind. 69; *Commissioners vs. Perry,* 5 Ohio, 56; *State Treasurer vs. Cross,* 9 Vt. 289, 31 Am. Dec. 626, hold that a contract with the officers of the State for the benefit of the State is valid, but they clearly distinguish between the cases where a promise is made to an individual for his private benefit, and those in which the promise is made to a public officer for the benefit of the public. This distinction is made in the case of *State vs. Johnson,* 52 Ind. 197, and in the course of the opinion the following extract from the decision in *Clippinger vs. Hepbaugh,* 5 Watts & S. (Penn.) 312, 40 Am. Dec. 519, is approvingly quoted: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government." The difference between the two classes of cases is clearly stated in *Odineal v. Barry,* 24 Miss. 9, where it was said: "The members of the board of police, as individuals, will not receive any portion of the money for which the note was given. At the time of the contract it was not intended or expected that they should receive it. It was not a proposition by the defendants

to pay them so much as individuals, in consideration that they would not change the site of the court house. If it had been, it would have been clearly illegal, and could not have been enforced."

It is true that a contract to pay for professional services in fairly placing the facts of a case before the officers of government is valid. *Trist vs. Child*, 21 Wall. (U. S.) 441; Smith Lead. Cases, (7th Am. ed.) 692; *Bryan vs. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55. But the contract in this case is not for professional services but for personal influence, and this constitutes an essential element, for personal influence is not a commodity for which money can be demanded. The case of *Oscanyan vs. Arms Co.*, 103 U. S. 261, cited by appellants is directly against them upon this point. In the course of the opinion in that case it was said: "But independently of the official relation of the plaintiff to his government, the personal influence which he stipulated to exert upon another officer of that government, was not the subject of bargain and sale. Personal influence to be exercised over an officer of government in the procurement of contracts * * * is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article. Numerous adjudications to this effect are found in the state and federal courts. This is true when the vendor holds no official relations with the government, though the turpitude of the transaction becomes more glaring when he is also its officer." In *Trist vs. Child, supra*, the court in speaking of professional services said: "But such services are separated by a broad line of demarcation from personal solicitation."

While contracts for the payment of fixed fees for professional services are valid, yet when the fees are made contingent upon success in obtaining the desired legislation, the contract sought, or the officer asked of the government, the contract becomes so tainted with illegality as to render it void. "High contingent compensation," said Justice Grier, "must necessarily lead to the use of improper means and the exercise of undue influence," and the decisions give approval to his discussion of the question of the legality of such contracts, and concur in the conclusion that all such contracts are against sound public policy. *Marshall vs. Baltimore, etc., R. Co.*, 16 How. (U. S.) 314; *Meguire vs. Corwine*, 101 U. S. 108; *Oscanyan vs. Arms Co., supra*, see opinion, p. 274; *Clippinger vs. Hepbaugh, supra; Wood vs. McCann*, 6 Dana, (Ky.) 366; *Mills vs. Mills*, 40 N. Y. 543, 100 Am. Dec. 535 (*ante*,

p. 17); *Ormerod vs. Dearman*, 100 Penn. St. 561, 45 Am. Rep. 391.

The contract before us has two infirmities, one of an agreement for the use of personal influence, and another of an agreement for compensation dependent upon the contingency of success. That we are correct in saying that the agreement is dependent upon a contingency is shown by the fact that the consideration became payable only in the event that the post-office was located and maintained in appellants' building.

Doubtless a contract to assist a property owner in fitting up or purchasing a building to be given to the government for public use would be valid, but in the present instance this was not the character of the consideration of the notes in suit, although such an element may have formed part of the consideration. The consideration of the notes is indivisible and the illegal cannot be separated from the legal, and under the familiar rule that where the consideration is in part illegal and there can be no separation the whole contract is void, the contract before us must be held invalid because of the illegality of the consideration.

Affirmed.

NOTE.—Compare with *Beal v. Polhemus*, 67 Mich. 130.

(84 ILLINOIS, 174, 25 AM. REP. 442.)

BYRD vs. HUGHES.

(Supreme Court of Illinois, September, 1876.)

This was a bill in equity, brought by George V. Byrd against George R. H. Hughes, to compel an accounting and a division of certain property, which the defendant was alleged to have obtained for services as agent or attorney of certain parties who were residents of the State of Virginia. The facts as stated in the bill sufficiently appear in the closing part of the opinion.

J. W. Beach, for appellant.

Lawrence, Campbell & Lawrence, for appellee.

CRAIG, J. (After stating the facts.) The transaction, when properly analyzed, is this: The complainant was the agent and confidential advisor of Turner and Washington, who resided in Virginia, and had large real estate interests in Chicago. They had in their service a distinguished lawyer in Chicago, to attend to such

legal business as would necessarily grow out of the money they had invested and were investing in Cook county.

The complainant, whose duty it was to guard and protect the interests of Turner and Washington, whose agent he was, and give them honest advice, and not place himself in a position where there would be a conflict between duty on the one hand, and self-interest on the other, in utter disregard of these well-known and wholesome principles, entered upon the task to induce his principals to discharge their attorney and employ, in his stead, the defendant. What was the object? Surely not to enhance the interest of his principals, because he concedes that they had in their service an attorney of skill and learning. But the sole object was, that he might obtain one-half of all fees that the attorney might earn in the transaction of his principals' business. The complainant, as we learn from the bill, at last succeeded in inducing his principals to discharge their attorney and employ the defendant, and now, as the attorney refuses to divide the fees thus earned of appellant's principals, he calls upon a court of equity to enforce his illegal contract.

We are aware of no principle of equity jurisprudence which would allow a court of equity to lend its aid to assist the complainant in the collection of fees earned under a contract based, as this one is, upon a consideration immoral and illegal. A contract based upon an illegal consideration could not be enforced in a court of law, much less would a court of equity, where a complainant is required to come into court with clean hands, enforce the performance of a contract founded upon an illegal consideration.

But even if the contract set up in the bill rested upon a valid consideration, we perceive no ground upon which the bill could be maintained. Suppose the defendant was associated with the complainant in the agency and retained as the attorney of Washington and Turner, under an arrangement that he would divide fees with the complainant—when Washington and Turner discharged the complainant, that terminated the arrangement.

The contract was in the nature of a partnership which might be terminated at such time as either party saw proper to withdraw. It is true neither withdrew, but Washington and Turner terminated the arrangement by discharging the complainant from the management of the business. The mere fact that they saw proper, after complainant was no longer an agent, to enter upon a new contract with the defendant, under which he performed service and

earned large fees, can be no ground for allowing the complainant to come in and share with him.

It is not claimed, in the bill, that fees were earned while the complainant was acting in connection with the defendant, and have not been accounted for, but the complaint is, fees were earned long after complainant had been discharged from the business, under a written contract the defendant made, to which the complainant was an utter stranger.

We perceive no ground upon which the bill can be sustained.

NOTE.—See also *Meguire vs. Corwine*, 101 U. S. 108; *West vs. Camden*, 135 U. S. 507; *Noel vs. Drake*, 28 Kans. 265, 42 Am. Rep. 162; *Holcomb vs. Weaver*, 136 Mass. 265; *Bollman vs. Loomis*, 41 Conn. 581.

CHAPTER III.

WHO MAY BE PRINCIPAL OR AGENT; AND HEREIN OF JOINT PRINCIPAL AND AGENT.

I.

WHO MAY BE PRINCIPAL.

(4 FLORIDA 192, 54 AM. DEC. 340.)

ST. ANDREWS BAY LAND COMPANY vs. MITCHELL.

(Supreme Court of Florida, January, 1851.)

Action of covenant upon an agreement under seal entered into between plaintiff and defendant. Plaintiff executed the agreement through a committee.

Keyes, for plaintiff.

Yonge and *Woodward,* for defendant.

THOMPSON, J. (After disposing of other questions.) The remaining point to be considered is that which alleges a want of power by the charter of the company to contract by a committee. All aggregate corporations from necessity must act and contract through and by means of agents, but we have never thought it of any importance by what name or description the agents were known and designated. The agent or agents employed may be called, president, director, trustee, cashier or secretary, or even a committee, without altering substantially their character as agents. Where the charter or act of incorporation prescribes the mode in which the officers or agents of a corporation must act, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued; but we do not understand from the charter of this company that there is any particular mode prescribed by which it is to contract within the limits of its authority. Nor is there any particular officer designated whose sanction or signature is necessary to give validity to the act. In *The Bank of the Metropolis vs. Guttschlick,* 14 Pet. (U. S.) 27, the agreement had

been made by the president and cashier of the bank, and the objection was that the act was not within the competency of those officers as such. The court says "it was questionably in the power of the bank to give authority to its own officers to do so." From the charter of this company, we do not see any objection to the the authorization of a committee to make the agreement in question for it. * * * * * * * * * * *

NOTE—In *Washburn vs. Nashville, etc., R. R. Co.* 3 Head. (Tenn.) 638. 75 Am. Dec. 784, it said: "The corporation of necessity acts through the instrumentality of its officers and agents. If not prohibited by the charter, it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation. It must act in this mode or not at all." See, also, *Protection Life Ins. Co. vs. Foote*, 79 Ill. 361; *Hurlbut vs. Marshall*, 62 Wis. 590; *Lyman vs. Bridge Co.*, 2 Aik. (Vt.) 255. 16 Am. Dec. 705.

(2 STEWART, 280.)

LUCAS vs. BANK OF DARIEN.

(Supreme Court of Alabama, January, 1830.)

Action in equity for relief against judgment at law, upon two, among other grounds; that judgments were obtained upon notes executed without complainant's authority, and that in some of the suits service had been accepted for complainant without his authority by an alleged agent. Complainant Walter Lucas had been in partnership with John Lucas under the firm name of J. & W. Lucas, and John Lucas had, by instrument under seal, authorized one Fort to make and indorse negotiable paper for the firm, and had also authorized one Kenan, in the same way, to accept service for the firm in certain actions. Court below dismissed the bill.

Goldthwaite and *Thorington*, for appellant.

Bugbee, Rockwell and *Gordon*, for appellees.

SAFFOLD, J. (After stating the facts and disposing of other questions.) That the ordinary and legitimate sphere of mercantile transactions is limited to simple contracts, and that the general power delegated by one member of a firm to another, by forming a mercantile connection, is equally limited, are propositions to which

I readily assent. The consequence of which is that one partner cannot directly bind another by deed, nor can he constitute an agent or attorney with sufficient authority to bind the partner in any obligation in the nature of a specialty, unless the other has given special authority, or, being present, consents by parol or otherwise, except that he may make any fair disposition of the partnership effects, or release a debt to the firm under seal, and make it operate against the whole. 2 Caines' Rep. 254-5, note A and cases there cited; also 1 H. & M. 423; 19 Johns. Rep. 513; 3 Kents' Com. 24.

In this case, however, it is not contended that the complainant has been subjected to any immediate obligation by deed or bond, either by J. Lucas, the partner, or by either of the attorneys appointed by him. But it is said that the principles of the objection equally restrained J. Lucas from delegating by power, under seal, the authority to Foot or Kenan to sign or indorse the notes or accept the service of writs, or do any other act; that even an act which would be valid against the firm without a seal, if done by the partner, or by agent under a parol appointment, would be void if executed by specialty. On this point, I think a nice discrimination is required. I take the distinction to be this: that if the bond or deed constitutes the contract, it must be made the evidence of it, and determines the remedy; then this principle applies, because the legal effect of the contract, the power of the remedy, and the rules of evidence are essentially different, the security being of higher dignity. 3 Kent's Com. 24. Here the objection relative to the sealed instruments is, that agents acted by virtue of powers created under seal by one of the partners. The only material question is, did those agents act with this consent, or by the authority of the firm. If one partner had power to constitute an agent in any form to do these acts, what injury can result, or how can it be material that the authority was given with unnecessary solemnity? The acts done by the agents are in the same form, and have but the same legal effect, as if the authority had been given in any other way. It is usual and necessary that partners in merchandise should have agents or clerks, with authority to represent them generally. The act of signing notes and giving indorsements in the partnership transactions, is a power falling within the usual scope of mercantile dealings; each partner can buy and sell partnership effects, and make contracts in reference to the business of the firm, and pay and receive, and draw and indorse and accept bills and

notes. *Garard v. Basse*, 1 Dallas R. 119; 3 Kent's Com. 17, and references there given. Hence, I am of opinion, that the appointment of Foot, and his acts, as attorney, in signing and indorsing the notes are valid, and tantamount to an appointment by both members of the firm; and that so much of the power as gave it the character of a deed was unnecessary and irregular and ought to be treated as surplusage which does not vitiate. The authority to Kenan in like manner to accept service of the writs is more questionable. (The condition of the case rendered a decision upon this point unnecessary.)

Affirmed.

NOTE.—In the same case, Collier, J., said: "The right of one partner to appoint an agent to conduct the business of the concern, results unquestionably from the genuine authority of partners. *Tillier vs. Whitehead*, 1 Dall. 269. And the acts of such agent, within the scope of the power given, will be as obligatory on the firm as if done by him who gave the authority." See, also, *Beckham vs. Drake*, 9 M. & W. 79; *Banner Tobacco Co. vs. Jenison*, 48 Mich. 459; *Harvey vs. McAdams*, 32 Mich. 472; *Wheatley vs. Tutt*, 4 Kan. 240; *Charles vs. Eshleman*, 5 Colo. 107; *Frye vs. Saunders*, 21 Kan. 26, 30 Am. Rep. 421; *Coons vs. Renick*, 11 Tex. 134, 60 Am. Dec. 230; *Carley vs. Jenkins*, 46 Vt. 721; *Durgin vs. Somers*, 117 Mass. 55; *Burgan vs. Lyell*, 2 Mich. 102.

(8 INDIANA, 195, 65 AM. DEC. 756.)

TRUEBLOOD vs. TRUEBLOOD.

(Supreme Court of Judicature of Indiana, November, 1856.)

PERKINS, J. Bill in chancery under the old practice to compel a specific performance, and to set aside a fraudulent deed. Bill dismissed. The facts of the case, so far as material to its decision, are as follows:

In 1845 William Trueblood was an infant, and owner of a piece of land. At that date Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single, simply the bond of Richard, and William is nowhere mentioned in it as a party, but his name is signed with his father's at the close of the condition, as may be

supposed, in signification of his assent to the execution of the instrument by his father. We shall so treat his signature to the bond.

After William became of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another, Robert Lockridge, who had notice, etc. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond.

The court below, as we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done. As we have seen, the bond is not in terms the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles; *Brock vs. Parker*, 5 Ind. 538.

If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in executing it. Can, then, an infant, after arriving at age, ratify the act of his agent, performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified; *State vs. State Bank*, 5 Ind. 353; if the latter, it can be; Reeve's Dom. Rel. 240.

In the first volume of American Leading Cases (3d ed.), 248, *et seq.*, the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded in solid reasons, they admit, may be doubted; but assert that there is no doubt but that it is law. See the cases there collected.

The law seems to be held the same in England. In *Doe vs. Roberts*, 16 Mee. & W. 778, a case slightly like the present in some respects, the attorney in argument said: "Here a tenancy has been created, either by the children, or by Hugh Thomas acting as their agent." Parke B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the

infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See *Hiestand vs. Kuns*, 8 Blackf. 345.

The decree below must therefore be affirmed with costs.

NOTE.—See further as to the capacity of an infant to appoint an agent: *Armitage vs. Widoe*, 36 Mich. 124; *Fonda vs. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Thompson vs. Lyon*, 20 Mo. 155, 61 Am. Dec. 599; *Knox vs. Flack*, 22 Penn. St. 337; *Lawrence vs. McArter*, 10 Ohio 37; *Philpot vs. Bingham*, 55 Ala. 435; *Doe vs. Roberts*, 16 M. & W. 778; *Whitney vs. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Harner vs. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Fairbanks vs. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446.

(18 WISCONSIN, 35, 86 AM. DEC. 743.)

WEISBROD vs. RAILWAY COMPANY.

(Supreme Court of Wisconsin, January, 1864.)

Action of Ejectment. Plaintiff, in making out his chain of title offered in evidence the record of a power of attorney from Arabella Crary to Leonard P. Crary, dated June 11, 1853; and admitted that the said Leonard was the husband of the said Arabella at the date of its execution. He also offered the record of a warranty deed from Arabella Crary and Leonard Crary to himself, executed in June, 1854, by said Leonard as attorney in fact for said Arabella, and for himself. This evidence was excluded, on the ground that a wife could not at that time execute a valid power of attorney to their husband, nor execute a deed by her husband as her attorney. Verdict for defendant. Plaintiff appealed.

Whittemore & Weisbrod, for appellant.

M. A. Edmonds, for respondent.

By the Court, DIXON, C. J.: A *feme covert* may at the common law be an attorney of another to make livery to her husband

upon a feoffment, and a husband may make such livery to his wife. She may act as the agent or attorney of her husband, and as such, with his consent, bind him by her contract or other act; or she may act as the agent of another in a contract with her own husband: Story on Agency, sec. 7. If it is no violation of the common law principle of the unity of husband and wife for the wife to act as the agent or attorney of her husband, the conclusion would seem irresistibly to follow that it is no infringement of the same principle to allow the husband to act as the agent of the wife in cases where, by the law, she is *sui juris*, and capable of acting for herself. At common law the separate existence of the wife was, for many purposes merged in that of the husband, and she could do no act. Incapable of acting for herself, she could not appoint another to act in her stead. Her disability was general, and hence we find no cases in the books of agency in her behalf, either by her husband or another; certainly none by her husband, unless they be some of very recent date, and which have arisen since the enactment of statutes enlarging the rights of married women, and in which the capacity of the husband to act as the agent of his wife seems rather to have been assumed than decided. Thus it will be seen from the report that it was assumed by the court of appeals in *Hauptmann vs. Catlin*, 20 N. Y. 247, that the husband might act as the agent of his wife in transactions respecting her separate estate. Her separate property was charged in an action at law, under the lien act, upon a contract made by her husband as her agent. The opinion in the case was written by the same learned judge, whose language in *White vs. Wager*, 25 Id. 328, is quoted by counsel for respondent to prove that the husband cannot act as such agent. Thus, too, it was assumed by this court in *Hobby vs. Wisconsin Bank*, 17 Wis. 167. But in neither case was the capacity of the husband to act, or the power of the wife to appoint him, directly raised or discussed. The question passed off *sub silentio*. But as we have already said, there seems on principle to be no reason to doubt the correctness of the doctrine thus assumed. The disability of the wife has in many respects been removed by statute, and she is now capable of acting, not only by herself, but by an agent, with no express limitation upon her power of appointment. If the doctrine of unity does not stand in the way, as it seems it cannot, then we see nothing to prevent her making her husband her agent, whenever she chooses to intrust him with the management of her affairs. It is true that the court of appeals

held in *White vs. Wager, supra,* that the statute does not enable the wife to convey land to her husband. It is also true that the statute does not authorize her to receive by gift, grant, etc., from her husband any real or personal property; and yet it would hardly be contended that this limitation upon her power to receive directly abrogates the common law rule that she may act as the agent of her husband in the sale and disposition of the same property to others. So too at the common law, she could not take by grant or gift from her husband, still she could convey to others as his agent. The distinction arises from the inherent difference between a mere power to convey and the conveyance itself. The former is not regarded in the law as a contract, whilst the latter is. Hence a person incapable of contracting may be the donee of a power; and husband and wife, for the purpose of giving and receiving a power either to and from each other and third persons, are to be considered as if no relation of marriage existed between them. For these reasons, we are of opinion that the power of attorney from Arabella Crary to her husband and the deed from her to the plaintiff, executed by her husband as her attorney in fact, should have been received in evidence. * * * *

Judgment reversed.

NOTE.--See further, as to the capacity of a married woman at common law to act by agent: *Dorrance vs. Scott,* 3 Whart., (Pa.) 313, 31 Am. Dec. 509; *Caldwell vs. Waters,* 18 Penn. St. 79, 55 Am. Dec. 592; *Marshall vs. Rutton,* 8 T. R. 545; *Lewis vs. Lee,* 3 B. & C. 291; *Fairthorne vs. Blaquire,* 6 M. & S. 73.

(71 NEW YORK, 199, 27 AM. REP. 38.)

NASH vs. MITCHELL.

(New York Court of Appeals, November, 1887.)

Action on a check, dated November 9, 1872, to the order of the plaintiff, signed "J. H. Mitchell, by C. H. Mitchell, attorney," indorsed by plaintiffs and dishonored. The check was given on November 4, 1872, in exchange for another of the same amount, drawn by the plaintiffs, to the order of C. H. Mitchell, and paid on the latter day. The defendant was the wife of C. H. Mitchell; she had given and deposited in the bank on which the check was drawn,

and in which she kept an account, a power of attorney authorizing her husband "to make, sign, indorse and accept all checks, notes, drafts and bills of exchange, for her in her name," etc. She had a house and ten acres of land, on which she resided, and which she carried on by her husband's agency, he hiring the hands and paying them with checks drawn by him in her name. She also had other real estate for which she received rents, and for which she paid disbursements in the same way. At the time the check in suit was drawn, she did not have a deposit large enough to pay it. Plaintiff had judgment, and defendant appealed.

James E. Wheeler, for appellant.

S. J. Crooks, for respondent.

ALLEN, J. The onus was upon the plaintiffs to show: First, that the drawing of the check by the agent was within the power delegated to him by the defendant; and, second, that it was in a transaction and for a consideration in respect of which the disabilities of the defendant as a *feme covert* were removed, and she at liberty to contract and assume liabilities as if she were a *feme sole.* There was no evidence that the husband of the defendant had assumed to act or had acted with the knowledge of the defendant without or beyond the scope of the written power of attorney, so that no question can arise as to the extent of his powers. The real and apparent power being the same, it must be determined by the instrument by which it was conferred. The attorney was authorized "to make, sign, indorse, and accept all checks, notes, drafts, and bills of exchange for" the defendant, and in her name, and the power of attorney was deposited with the bank in which she kept an account, as its authority to accept the signatures and indorsements of the agent in the name of the principal in all matters mentioned in the instrument.

All the acts authorized *ex vi termini* necessarily had respect to the separate estate and property of the defendant, as to which she had the statutory ability to contract. She could not delegate power beyond this, or authorize another to do that for her which she could not do in person. The power granted was to deal with the moneys and choses in action, parts of the separate estate of the defendant, and not to create a debt, or charge the separate estate for a debt, although contracted for the benefit of the estate.

The bank was not authorized to pay a check if the defendant was

without funds to meet it; and had it done so, the separate estate of the defendant would not have been charged with its payment. The plaintiffs were bound to know: First, the legal capacity of the defendant to contract; and, second, the actual authority of the agent with whom they dealt. *North River Bank vs. Aymar*, 3 Hill, (N. Y.) 262. The agent did not by the check transfer, or assume to transfer, or act in respect to, funds and moneys on hand, and subject to a draft as part of the separate estate of the defendant. The effect of the transaction, if legitimate and obligatory, was to contract a debt payable in the future, and charge the same upon the separate estate of the defendant, which was not within the terms of the authority. But had the defendant in person drawn and delivered the check to the plaintiffs upon the same consideration, it could not have been charged upon her separate estate without proof that the debt was contracted for the benefit of her estate. In *McVey vs. Cantrell*, 70 N. Y. 295, recently decided, the declaration of the defendant at the time of borrowing the money, that she wanted it to pay interest due upon a mortgage upon her land was held sufficient evidence that the debt was contracted for the benefit of her estate.

A married woman may be estopped by her acts and declarations in all matters in respect of which she is capable of acting *sui juris*. *Bodine vs. Killeen*, 53 N. Y. 93.

The common law disabilities of married women are so far removed by statute in this state, that they may make contracts and create debts in or about any trade or business carried on by them, or relating to or for the benefit of their separate estate. Upon contracts thus made and for debts thus created, their separate estate is chargeable by law. They may also create an express charge upon their estate upon and for other contracts and debts, or as security for others; but it must be created in terms and by writing. *Manhattan B. & M. Co. vs. Thompson*, 58 N. Y. 80; *Corn Ex. Ins. Co. vs. Babcock*, 42 Id. 614, 1 Am. Rep. 601. There is no charge upon the estate of the defendant created by the terms of the check. It is in the ordinary form of a draft upon a bank, and only imports the ordinary obligations of that class of commercial instruments. The defendant was not carrying on a trade or business. The management of her landed property, the receipts of the rents and income and disposing of them, was not a trade or business within the meaning of the statute enabling married women to carry on a trade or business. That statute has

respect to business pursuits, mechanical, manufacturing, or commercial. The care and supervision of lands and property owned by a *feme covert* is not the carrying on of a separate trade or business. If it were so, every married woman who owns a house and garden, or has a deposit in a savings bank, would be a tradeswoman carrying on a business.

There is no evidence that the check related to, or was given for, the benefit of the defendant or her separate estate, or in her business, or that the plaintiffs supposed it was so given. Upon the face of the transaction, it was given for money loaned to the husband. The plaintiffs gave their check, payable at sight, to the order of the husband, and received for it the check in suit, payable several days in the future. If we were at liberty to assume, without proof, the principal and main fact necessary to maintain the action, we could affirm the judgment. But the affirmative upon this, as upon every material issue, and as to every fact necessary to be established was with the plaintiff. The referee has not found this fact, and could not have found it upon the evidence. The plaintiffs, suing a married woman, were bound to prove every fact; not only the contract, and that it was made by her or by her authorized agent, but that it was a contract she was capable of making. The law does not authorize the presumption, and courts cannot assume, without evidence, that a simple contract, without anything on its face to indicate the fact, was made for the benefit of the estate of a married woman. The disabilities of a married woman are general, and exist at common law. The capabilities are created by statute, and are few in number and exceptional. It is for him who asserts the validity of a contract of a *feme covert*, by evidence to bring it within the exceptions.

The judgment must be reversed, and a new trial granted.

Judgment reversed

NOTE:—See also as to married woman's capacity, under modern statute, to act by agent; *Kenton Ins. Co. vs. McClellan*, 43 Mich. 564; *Knapp vs. Smith*, 27 N. Y. 277; *Rowell vs. Klein*, 44 Ind. 290; *McLaren vs. Hall*, 26 Iowa, 297.

II.

WHO MAY BE AGENT.

(45 ALABAMA, 656.)

LYON vs. KENT.

(Supreme Court of Alabama, January, 1871.)

In January, 1865, Kent, Payne & Co., of Richmond, Va., had a quantity of cotton in Montgomery, Ala., in charge of their agent, Browder. They gave an order upon Browder to one Singleton, of Quincy, Ill., for the delivery of the cotton to the latter. Singleton sold the cotton to one Guy, who deposited it in the warehouse of Lyon & Co. Kent, Payne & Co., brought an action of detinue against Lyon & Co., for the recovery of the cotton upon the ground that Singleton's sale of it was unauthorized. The plaintiffs recovered and defendants appealed.

Lyon, Jones and *Smith,* for appellant.

Clarke & Lyon, contra.

PETERS, J. The charge given by the court, of its own motion, on the trial below, and excepted to by the defendants, was correct. The only negotiation that Singleton had with the firm of Kent, Payne & Co., touching the cotton, took place in January, 1865, at Richmond, Virginia. If there was a sale at all, or any contract entered into between Singleton, a citizen of Illinois, and Kent, Payne & Co., citizens of Virginia, by which any title or interest in the cotton was attempted to be passed from the one to the other, it was wholly void and incapable of ratification. No trading between these parties was then allowable, without a permit of the government. And the president's pass was not sufficient for that purpose. *McKee vs. United States,* 8 Wall, 163, 166; *The Ouachita Cotton,* 6 Wall, 521, 531; *Brown vs. Tarkinton,* 3 Wall, 377, 381; *Kennett vs. Chambers,* 14 How. 38, 50. Then, the order alone warned all who looked upon it, who knew the domicile of the parties to it, that it could not be evidence of a legal title. And it was not, unconnected with other proof, a power to sell or dispose of the cotton.

Yet, though the order of itself was not evidence of a sale to Singleton, or a power to sell, it shows that the owners of the cot-

ton had authorized him to *take possession* of it. This he could do as the agent of the owners. This was not forbidden to him or to them by law, or the policy of the government. They could change the agency of the custody of their cotton from one person to another. And they could make any person, capable of acting as an agent, such agent to take possession of their property for them, and keep it for them. They could transfer its custody from Browder to Singleton without a violation of law. The objection which might be supposed to exist to such an agency during the war, ceased as soon as the war was ended; and its purpose being then legal, it might be legally consummated. Any one, except a lunatic, imbecile, or child of tender years, may be an agent for another. It is said by an eminent author and jurist, that "It is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others. Thus, for example, monks, infants, *femes covert*, persons attainted, outlawed or excommunicated, villains and aliens, may be agents for others." Story's Agency, §§ 6, 7, 9. So, a slave, who is *homo non civilis*, a person who is but little above a mere brute in legal rights, may act as the agent of his owner or his hirer. *Powell vs. The State*, 27 Ala. 51; *Stanley vs. Nelson*, 28 Ala. 514. It was, then, certainly not unlawful, or against the public policy of the nation, for Kent, Payne & Co. to keep their cotton, and keep it safely, during the late rebellion. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property; because the agent is but the principal acting in another name. The thing done by the agent is, in law, done by the principal. This is axiomatic and fundamental. It needs no authorities to support it. *Qui facit per alium facit per se.* Broom's Max, marg.; I Pars. Cont., 5th ed., p. 39, *et seq.;* Story's Agency, § 440. And to this it may be added, that an agent in dealing with the property of his principal, must confine his acts to the limit of his powers; otherwise, the principal will not be bound. I Pars. cont. 41, 42, 5th ed.; *Powell vs. Henry*, 27 Ala. 612; *Botts vs. McCoy, et al.*, 20 Ala. 578; *Allen vs. Ogden*, 1 W. C. C. 174. And it is also the duty of one dealing with an agent to know what his powers are, and the extent of his authority. *Van Eppes vs. Smith*, 21 Ala. 317; *Owings vs. Hull*, 9 Peters, 607, *supra.*

There was conflict in the testimony before the jury as to the

extent and character of the agency of Singleton. There was a wide difference between his statement and that of Kent, with whom he transacted the business about the cotton, as to the purpose and scope of the agency intended to be established. It is not to be presumed that the parties intended to violate the law. But whether they did, or not, and what were the powers intended to be conferred upon the agent, are questions for the jury. * * *

Judgment affirmed.

(4 DEVEREUX & BATTLE, 180.)

COX vs. HOFFMAN.

(Supreme Court of North Carolina, December, 1838.)

Trover for a mule. The mule was borrowed from plaintiff's overseer by defendant's wife, and was so injured while in defendant's service that it died. It was shown that defendant's wife had previously, with his approval, borrowed horses of plaintiff, and that she was in the habit of borrowing from another neighbor, with her husband's approbation. Defendant was absent from home when the injury to the mule occurred and when he returned and was informed of it, he told his wife "he was sorry and that she had done wrong."

The court charged the jury that if they believed that the mule went into the possession of defendant's wife, and if she had his approval of that particular borrowing, either express or implied, and if the mule was thereby lost to the plaintiff, he was entitled to recover. Verdict for plaintiff. Defendant appealed.

Heath, for defendant.

Iredell, for plaintiff.

DANIEL, J. There can be no exception to the charge of the judge. A *feme covert* may become an agent even for her husband. Co. Litt. 52*a*; *Prestwick vs. Marshall,* 7 Bingh. 565; 1 Esp. Rep. 142; 2 Esp. Rep. 511. Such appointment as agent may be inferred from acts and the conduct of the supposed principal respecting her. When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent, as well as of its existence; and in solving all questions on this subject, the general

rule is, that the extent of the agent's authority is (as between his principal and third persons) to be measured by the extent of the usual employment of that person. *Pickering vs. Busk,* 15 East, 38; *Whitehead vs. Tuckett,* 15 East, 400; *Townsend vs. Inglis,* Holt, 278; 3 Esp. 60; 4 Camp. 88; 2 Stark Rep. 368; Smith's Mer. Law, 57.

Secondly, the defendant was liable for the injury done to the property of the plaintiff by the negligence, carelessness or unskillfulness of his servants in their performance of his business. The wife in the eye of the law is his servant; and the husband would be equally liable to third persons for her negligent and careless acts in doing his business, as he would be for the acts of any other of his servants. The judgment must be affirmed.

Judgment affirmed.

NOTE—See, also, as to capacity of a married woman to act as agent of her husband or a stranger. *Butler vs. Price,* 110 Mass. 97; *Singleton vs. Mann,* 3 Mo. 464; *McKee vs. Kent,* 24 Miss. 131; *Whitworth vs. Hart,* 22 Ala. 343; *Louisville Coffin Co. vs. Stokes,* 78 Ala. 372; *Mickelberry vs. Harvey,* 58 Ind. 523; *Martin vs. Reetor,* 101 N. Y. 77; *Miller vs. Watt,* 70 Ga. 385; *Sims vs. Smith,* 99 Ind. 469; 50 Am. Rep. 99.

AS TO THE CAPACITY OF A PARTNERSHIP TO ACT AS AGENT.

(See *Deakin vs. Underwood, post,* p. ——.)

(18 OREGON, 351, 17 AM. ST. REP. 737.)

KILLINGSWORTH vs. PORTLAND TRUST CO.

(Supreme Court of Oregon, January, 1890.)

LORD, J. This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises, pursuant to an agreement to that effect. The defendant denies this, and alleges as the attorney in fact of one Deborah H. Ingersoll in compliance with said agreement that it did execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred on the ground that the same does not state facts sufficient

to constitute a cause of defense to the cause of action alleged. The point raised by the demurrer is: Can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? In this State the right to become incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Corporations which owe their existence to the common law must be governed by it in the mode of their organization, in the manner of exercising their powers and in the use of the capacities conferred. But the legislature may authorize the creation of corporations for many purposes not contemplated by the common law and endue it with powers and capacities to be exercised in disregard of its rules, or which may greatly extend, modify or limit its common law powers and privileges.

The measure of the legislative power in this regard is limited only by circumstantial provisions. Ordinarily, in the creation of corporotions, the common law incidents and powers are implied, unless otherwise provided or restrained by the law of its corporate existence. But in determining the nature and extent of the powers and capacities conferred on a corporation, and the mode of their exercise, the law of its creation, whether a charter or a statute, must be consulted, for it has no power except as thus given, either expressly or as incidental to the exercise of the powers granted.

It is provided by our statute that a corporation may engage in any lawful enterprise, business, pursuit or occupation (Code, sec. 3217), so that, unless corporations are affected with some disability, when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this State, exactly as individuals. By its articles of corporation the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation or person in the management and control of real estate or other property, its purchase, sale or conveyance, etc." No question is made but what the defendant, by its articles of incorporation, has conferred upon it the power to do the act for which there is claimed to be an alleged failure, but the contention is that a corporation, from the nature of the organization as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from

the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor, because its duties are of a personal nature and cannot be delegated, or to take an oath when so required by law, before proceeding to execute some duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common law powers, and when thus created, its powers, capacities and modes of exercising them depend upon the statute. Nor is the disability in such cases of a character which cannot be obviated by statute, for, as Mr. Morrawetz says, there are numerous instances in which corporations have been expressly empowered by statutes to administer estates. Morrawetz on Corporations, sec. 357.

The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was that it could not take an oath for the due execution of the office. 1 Blackstone's Com. 477. But, to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the State may not require any oath for the due execution of the office, and in such case, when no other impediment intervenes, a corporation may act as administrator, when the law of the State does not require the administrator to take an oath. It was not so held in *Deringer's Admr. vs. Deringer's Admr.*, 5 Houst. (Del.) 416, 1 Am. St. R. 156. So, too, in *Lincoln's Savings Bank vs. Ewing*, 12 Lea, 602, where it was urged that a corporation was incapable of taking to itself a mortgage or trust conveyance, it was held that a corporation may take and hold as a trustee or mortgagee, and execute a trust in which it has an interest within the scope of its business, and a failure or inability to comply with the provisions of the code, by taking the required oath, would not affect the validity of the deed or the title vested. As it is not questioned that the business in which the defendant is engaged is a lawful occupation and that the articles of incorporation are sufficient to confer the power on the defendant to act as an attorney in fact in furtherance of its legitimate objects, there is nothing to prevent it from doing the acts essential to carry on its business and comply with the terms of its agreement, unless it is incapable of performing such acts from some cause inherent in itself. A corporation, like a natural person, has a right to conduct its legitimate business

by all the means necessary to effect such object. Within its prescribed range it can do whatever a natural person, *mutatis mutandis*, could do. Wharton on Agency, sec. 57. In *Barry vs. Merchants' Exchange Co.*, 1 Sandf. Ch. 280, it is said: "Every corporation, as such, has the capacity to take and grant property and to contract obligations the same as an individual. * * * And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such objects, unless expressly prohibited by law." Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual or another corporation? As the owner of real property, it can, by its authorized agents, execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it. Why, then, may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation and to carry on the business in which it is engaged?

"Within the scope of its corporate powers," says Mr. Mechem, "unless there are express provisions in its charter, or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership, or another corporation. Many of the great corporations of the country are organized for this express purpose under statutes or charters conferring and defining their powers and the methods of executing them; but even in other cases, the authority so to act might be implied as auxiliary to their main purpose." Mechem on Agency, sec. 64. It is clear, then, that a corporation may act as the agent of another, and if so, it must be endued with the faculties or instrumentalities to perform the office it is authorized to undertake and carry out the purposes of its creation. When a corporation engages in a legitimate business and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in *Hopkins vs. Gallaton Turnpike Co.*, 4 Humph. 412, "the common law rule with regard to natural persons, that an agent, to bind his principal by deed, must

be empowered by deed himself, cannot in the nature of things be applied to corporations aggregate, these being of mere legal existence, and their board, as such, literally speaking, are incapable of a personal act. They direct or assent by vote, but their most immediate mode of action must be by agent." Being a creation of the law—an artificial person—it can only act by agents who are its limbs or instrumentalities to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation, exactly as the act of an individual is his act. As such upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers, and in such cases, its officer affixing the seal is the party executing the deed within the meaning of the statute requiring deeds to be acknowledged by the grantor. *Kelly vs. Calhoun*, 95 U. S. 711; *Frostburg M. B. Ass'n vs. Brace et al.*, 51 Md. 508; Am. & Eng. Encl. of Law, tits. "Acknowledgments," "Corporations."

In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property; but we know it can and that the acts of it officers in so doing is the act of the corporation. When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being, or artificial person, in the performance of its engagements, and involves no delegation of powers. So that when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and as such must be considered to be included in the artificial person as instrumentalities authorized by him to do the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained.

There was no error, and the judgment must be affirmed.

III.

OF JOINT PRINCIPALS.

(97 PENNSYLVANIA STATE, 493, 39 AM. REP. 818.)

ASH vs. GUIE.

(Supreme Court of Pennsylvania, May, 1881.)

Action against a large number of defendants, who were members of a Masonic lodge, to hold them liable upon a certificate of indebtedness, executed by the master and wardens, for a debt incurred in the erection of a lodge building. Plaintiff had judgment below.

R. E. Monaghan and *P. F. Smith,* for plaintiffs in error.

R. J. Monaghan, for defendants in error.

TRUNKEY, J. One of the defendants, called by plaintiffs, testified: "The full title of our lodge is Williamson Lodge, No. 309, F. and A. M. F. and A. M. means Free and Accepted Masons. The purposes of our lodge are charitable, benevolent and social." This is the evidence as to the objects for which the association was formed, and without proof of its constitution or rules respecting admission of members and the management of its affairs, it was held to be a common partnership. A partnership has been defined to be a "combination by two or more persons, of capital or labor or skill, for the purpose of business for their common benefit." It may be formed, not only for every kind of commercial business, but for manufacturing, hunting, and the like, as well as for carrying on the business of professional men, mechanics, laborers, and almost all other employments. It would seem that there must be a community of interest for business purposes. Hence voluntary associations or clubs, for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Pars. on Part. 6, 36, 42.

A benevolent and social society has rarely, if ever, been considered a partnership. In *Lloyd vs. Loaring,* 6 Ves. 773, the point was not made, but Lord ELDON thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd Fellows, an association of persons for

purposes of mutual benevolence, erected a building, which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds it was said, that as respects third persons, the members were partners, and that lien-creditors, who were not members, were entitled to preference as against the liens of members. *Babb vs. Reed,* 5 Rawle (Pa.) 151, 28 Am. Dec. 650. Had the members been called joint-tenants of the real estate the same principle in the distribution would have applied. In *Flemyng vs. Hector,* 2 M. & W. 172, Lord ABINGER stated the difference between a body of gentlemen forming a club and meeting together for one common object, and a partnership where persons engage in a community of profit and loss, and each partner has the right of property for the whole, and in any ordinary transactions may bind the partnership by a credit. He held that a club and its committee must stand on the ground of principal and agent and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. After noting the rules of the club in the case before him he says: "It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound?" A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his cotenant. Thus one of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body, for money borrowed for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred. *Ricketts vs. Bennett,* 4 M. G. & S. 686.

Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against every member

from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who participated in the erection of the building by voting for and advising it, are bound the same as the committee who had it in charge. And so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade. * * * *

Judgment reversed.

NOTE—See following case: That voluntary unincorporated associations, clubs, societies, committees, and the like, are not partnerships but that the liability of members is to be determined by the law of principal and agent, see: *Flemyng vs. Hector*, 2 M. & W. 172; *Todd vs. Emly*, 7 M. & W. 427, S. C. 8 M. & W. 505; *Caldicott vs. Griffiths*, 8 Ex. 898; *Lafond vs. Deems*, 81 N. Y. 514; *Burt vs. Lathrop*, 52 Mich. 106; *Rice vs. Peninsular Club*, 52 Mich. 87; *Devoss vs. Gray*, 22 Ohio St. 169; *Newell vs. Borden*, 128 Mass. 31; *Volger vs. Ray*, 131 Mass. 439; *Ray vs. Powers*, 134 Mass. 22; *Heath vs. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Eichbaum vs. Irons*, 6 Watts & Serg. (Pa.) 67, 40 Am. Dec. 540.

(55 CONNECTICUT, 103, 3 AM. ST. REP. 40.)

DAVISON vs. HOLDEN.

(Supreme Court of Errors of Connecticut, April, 1887.)

Action for goods sold by the plaintiffs to the Bridgeport Coöperative Association. Judgment for defendants, and plaintiffs appealed.

G. W. Wheeler and *H. J. Curtis*, for appellants.

R. E. DeForest and *F. W. Holden*, for appellees.

By the Court, PARDEE, J. The defendants with sundry other persons associated themselves under the name of the Bridgeport Coöperative Association, an unincorporated trading association. They established a meat market. Their purpose was to buy at wholesale, and retail to any person who would buy, regardless of

membership, and to the members at such a price as would relieve them from paying at least one middleman's profit. Each member contributed something to the starting fund, the amount determined by himself. No profits were anticipated beyond payment of the expenses of management. The members held meetings and elected officers; these employed managers to conduct the business; these last bought and sold, paying the receipts to the treasurer. One of the defendants was president, the other treasurer. Upon request of the managers the plaintiffs sold merchandise to the association; this suit is for the price thereof.

It did not otherwise appear than from the above facts that any of the members of the association ever held themselves out as partners, or as being liable as individuals, for the obligations of the association; or that the plaintiffs or any other persons ever gave credit to them, either as individuals or as partners; or that the members entered into any agreement of co-partnership among themselves; or into any agreement or understanding by which they or any of them should become personally liable for the debts of the association. The defendants claimed that they were not liable either as individuals or as co-partners.

The determination of the controversy as to the liability of the defendants depends not at all upon the question whether they and the other associated individuals were partners as between themselves; nor upon the question whether as between all the associates and strangers they were such; but upon the law of agency. If the defendants clothed an agent with unrestricted authority to buy, they must pay, regardless of the other questions.

Upon the record, the defendants, with others undisclosed, associated themselves for commercial purposes, for their pecuniary advantage. For convenience, they transacted business under an assumed associate name; sent their managers and agents into the market with unrestricted authority to buy goods and pledge their credit under that name; to buy for the benefit of all jointly and of each individually. In the due execution of the authority conferred upon them they contracted the debt in suit, and pledged the joint and several credit of the associates. As a matter of law, the plaintiffs, in giving credit to the associate name, gave credit to the individuals who upon inquiry should be found to stand behind it.

It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that as matter of law they would be, or that they intended that

the goods when bought should become the property of the association. Having given to the agent unrestricted authority to buy, their secret intent as to the ultimate destination of the merhandise is of no avail. The rule that he who instructs his agent to buy can be made to pay stands quite independent of intent or knowledge; he who buys by an agent buys by himself, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he buys.

The statute permits individuals to unite under a distinguishing associate name for trading purposes; but they do not thereby acquire either corporate powers or immunity from individual liability. If they choose so to do, they can institute a suit for the common benefit in the assumed name; also they may be made defendants under the same name. If the latter, execution will go against common property of the association as such, and not against individual property. If, disregarding the fact and form of association, the suit is against all of the individuals, execution will go against the individual property of any. A suit may be instituted against them as individuals as at common law, if the plaintiff will take the risk of naming all, and of naming them correctly. If he names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names; if no such plea is interposed, those who are named are properly sued, and must submit to judgment. If the associated persons send an agent into the market with unlimited authority to make purchases and contract debts in the name and for the benefit of the association, and the agent discloses the name of the association and not the names of the individuals composing it, the creditor may, if he is content to look only to the property of the association as such for his security, institute his action against the association by its distinguishing name. If he desires to reach the individual property of members, he must institute his suit against such and so many of them as he can name, as individuals; he may do this even if the sale was made and the credit given in form to the association, and the name of no individual member was then known to him. He may do this for the reason that he gave credit upon the request of a known agent for an unknown principal. By operation of law, the credit was to the principal from the beginning, to be enforced whenever he can be discovered. Reversed.

NOTE.—See *Hubbard vs. Tenbrook*, *post*, p —.

IV.

OF JOINT AGENTS.

(53 NEW YORK, 121.)

HAWLEY vs. KEELER.

(New York Court of Appeals, June, 1873.)

Action to recover damages for the alleged breach of a contract for the sale of a quantity of cheese. Defendants, who were the patrons of a cheese factory, had appointed a committee of three persons, Bogardus, Morse and Keeler, to make contracts for the sale of their cheese for the year 1868. Bogardus was not a patron nor interested in the manufacture of the cheese, and took but little part in the sales. The others acted without consulting him and made many sales, the proceeds of which were distributed among the defendants. In July, the plaintiffs bought a quantity of cheese of Morse and Keeler, without the concurrence or participation of Bogardus. In November, they made the contract in question with Morse and Keeler for the purchase of a large quantity. Bogardus was not consulted. The contract not having been performed, this action resulted. Defendants claimed that the contract was void, upon the ground that the three agents must act together, and that without Bogardus' participation defendants could not be bound. Verdict for plaintiffs, and defendants appealed.

Francis Kernan, for appellants.

M. Goodrich, for respondents.

ANDREWS, J. (after disposing of other questions). The remaining question relates to the validity of the contract, in view of the fact that but two of the three committeemen, appointed by the patrons to make sales, acted in making it. It is well settled, as a general doctrine in the law of agency, that when an authority to act in a matter of a private nature is conferred by the principal upon more than one person, all must act in the execution of the power. This is the construction which the law puts upon the power following the supposed intention of the parties, and there must, ordinarily, be a joint execution of the agency. The authority may

be conferred in such terms as to authorize a several execution, or an execution by a majority or other number; and in the absence of express words it may have been exercised under such circumstances as will justify the inference that the principal intended that less than the whole number might act; in which case he would be bound to those who had acted upon such inference. The general rule, that a joint execution must be had of an authority given to several, has been made to yield for the benefit of trade, and to meet supposed necessities, in contracts made by one of several joint owners of ships, and in case of sales, made by one of two factors, of goods consigned to them for sale. In this case it appeared that Bogardus had not acted, to any extent, as one of the committeemen during the year. There had been frequent sales made by Keeler and Morse before this sale without his advice or concurrence; and the money arising therefrom had, from time to time (as may be inferred from the evidence), been distributed among and received by the defendants. The plaintiffs, in July previous, made a purchase of the two acting committeemen, without any participation of Bogardus in the transaction; and the cheese embraced in the contract in this case was afterward, as the proof tends to show, sold to other parties without consultation with him. The patrons lived in the vicinity of the factory. Some of them, not on the committee, were present at times when the question of the sale of cheese was considered. The question is not without difficulty; but we are of opinion that the jury, in view of the character of the agency, the manner in which, for a long time, the authority had been exercised, the prior dealings with the plaintiffs, the receipt by the defendants from time to time of the proceeds, from sales made by Keeler and Morse alone, without dissent or objection to the contracts made, might lawfully find that the patrons had knowledge of and assented to the execution of the power of sale by a majority of the committee. It cannot be assumed, under the circumstances, that the principals were ignorant of the conduct of their agents; but the presumption is that they understood the course of the business and dealings with the common property, especially as no evidence was given on their part that they were not informed thereof. The concurrence of Keeler and Morse, two of the committeemen, in making the contract sued upon, was sufficiently shown, and the defendants were bound by it. * * *

Affirmed.

NOTE.—A power conferred upon a number, jointly or severally, must be

executed by all or one, unless a contrary intention clearly appears. *Guthrie vs. Armstrong*, 5 B. & Ald. 628. See, also, *North Carolina R. R. Co. vs. Swepson*, 71 N. C. 350; *Cedar Rapids, etc., R. Co. vs. Stewart*, 25 Iowa, 115; *Hartford F. Ins. Co. vs. Wilcox*, 57 Ill. 180.

(52 VERMONT, 87, 36 AM. REP. 734.)

FIRST NATIONAL BANK OF NORTH BENNINGTON vs. TOWN OF MOUNT TABOR.

(Supreme Court of Vermont, October, 1879.)

Action to recover upon certain interest coupons which had been attached to bonds purporting to be issued by defendant and held by plaintiff. Plaintiff recovered, and defendant appealed.

W. G. Veasey and *W. C. Dunton*, for defendant.

E. J. Phelps, for plaintiff.

ROYCE, J. * * * The plaintiff was a *bona fide* holder of the coupons sued upon, without notice of any defense to said coupons or the bonds to which they were originally attached, and which were also owned by the plaintiff. To defeat the plaintiff's right of recovery, the defendant offered evidence tending to show that the facts set forth in the certificate, which was signed and caused to be recorded by two of the three commissioners named in the instrument of assent to which said certificate was appended, were not true. The act provides (§ 6) that such certificate, if duly executed and recorded, shall be conclusive evidence of the facts therein set forth. See *First National Bank of St. Johnsbury vs. Concord*, 50 Vt. 257, 281.

The claim of defendant is that the certificate in this case, being signed by but two of the three commissioners, was not a compliance with the act, and consequently does not estop the town from disproving the truth of the facts set forth in it. The offer was to show that the third commissioner refused "to sign such certificate for the reason that such instrument of assent had not been signed by a majority of the resident taxpayers of said town, as required by said act;" which necessarily implies that he acted with his associates, although the case does not show that he took the oath

required by section 6, so far as to satisfy himself that the requisite assent did not appear upon the instrument, and thereupon refused to concur with them in the decision which they reached and embodied in their certificate. The question of law presented for our decision, then, is, was the act of two of the three commissioners, the third sharing in their deliberations but refusing to concur in their decision, a sufficient compliance with the law? In view of the fact that there is a dictum by WHEELER, J., in *Danville vs. Montpelier & St. Johnsbury Railroad Co.*, 43 Vt. 144, 155, in which that learned judge expresses the opinion, upon common law principles, that the authority conferred upon the commissioners under an enabling act almost precisely similar in its terms, so far as the duties and powers of the commissioners are concerned, to this one, was a joint authority, in the exercise of which all must concur, we have deemed it proper to give to the subject a more extended consideration than we should otherwise have thought necessary. It seems, at common law, that when an authority is conferred upon several it is sometimes necessary to its lawful exercise that all should act together and all concur in the result, while under other circumstances the decision and act of the majority is good, provided all meet and deliberate, or have notice so to do; and in yet other cases the act of the majority, or the majority of the quorum alone, will be upheld.

In the case at bar it is only necessary to deduce from the authorities which of the two first named rules is to be here applied.

The distinction is laid down by Lord COKE, Co. Litt. 181*b:* "Secondly, there is a diversitie between authorities created by the partie for private causes and authoritie created by law for execution of Justice. As for example, if a man devise that his two executors shall sell his land, if one of them dye the survivor shall not sell it; but if he had devised his lands to his executors to be sold, then the survivor shall sell it. * * * If a man make a letter of atturney to two, to do any act, if one of them dye the survivor shall not do it; but if a *venire facias* be awarded to foure coroners to empannell and returne a jury, and one of them dye, yet the other shall execute and returne the same. If a charter of feoffment be made and a letter of atturney to foure or three joyntly or severally to deliver seisin, two of them cannot make liverie; because it is neither by them foure or three jointly, nor any of them severally; but if the sherife upon a *capias* directed to him make a warrant to foure or three jointly or severally

to arrest the defendant, two of them may arrest him, because it is for the execution of justice, which is *pro bono publico*, and therefore shall be more favourably expounded, than when it is only for private; and so hath it beene adjudged—*Jura publica ex privato promiscue decidi non debent.*" Following and applying this principle, the decisions down through the English reports, though not numerous upon this point, are clear that when an act is to be done by several which is matter of public concern, all must meet and confer, and the majority may then decide. In *Billings vs. Prinn*, 2 Bl. Com. 1017, where a warrant of commitment required to be signed by two justices and they acted separately, Lord DEGREY, C. J., said: "There is no use in appointing two or more persons to exercise judicial powers, unless they are to act together." This case was expressly followed in *King vs. Forrest*, 3 T. R. 38. In *King vs. Beeston*, *Id.* 592, the church-wardens and overseers, with the consent of the major part of the parishioners, were authorized by statute to contract for the support of the poor. All but one of the church-wardens and overseers acted in making a contract, and he refused to join. The act of the majority was held sufficient.

Lord KENYON, C. J., said: "A contract has been entered into in which the parish at large is concerned, and which the act of Parliament has enabled the parish officers with the concurrence of the parish to enter into, and the question is whether one obstinate man, in opposition to all the rest of the parish, in an act in which they are more interested than he is, shall be able to defeat their purpose. I do not mean to say that the church-wardens and overseers are technically a corporation; but as far as concerns the regulation of the poor of the parish they stand in *pari ratione.* * * * This is very different from the case of trustees in settlements, who are generally chosen by the different branches of the family, in which case it is necessary that they should all concur in every act, in order that each may protect the interest which he was appointed to guard."

In *Witherell vs. Gartham*, 6 T. R. 388, a power given by deed to the vicar and church-wardens to appoint a schoolmaster was held well executed by the vicar and a majority of the church-wardens, it being strongly urged by counsel, among other things, that the trust was one of a public nature. LAWRENCE, J., says: "In general, it would be the understanding of a plain man, that where a body of persons is to do an act, a majority of that body would bind the rest."

In *Grindley vs. Barker*, 1 B. & P. 229, which is regarded as a leading case upon this point, a condemnation by four out of six triers of leather appointed under a statute, the whole number having met and deliberated, was sustained. EYRE, C. J., says: "I think it is now pretty well established that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole;" referring to the opinion of Lord HARDWICK, in *Attorney General vs. Davy*, 2 Atk. 212: "When all have assembled and communicated to each other the necessary information, it is fitter the majority should decide than that all should be pressed to a concurrence." BULLER, J. "Now it seems to me that upon the first question the authority of Co. Litt., if we went no further, is decisive, because it is there said in express terms that in matters of public concern the voice of the majority shall govern." HEATH, J. "All must concur in trying, and then, though they be of different opinions, some of one opinion, some of another, yet all having tried, the majority shall bind."

ROOKE, J. "The authority given to the triers in the present instance is general to examine and try whether certain goods are serviceable or not, and is committed to them for the advancement of public justice, and as a public trust. Now the decisions are numerous (and may be found in Viner, title authority, letter B) to show that a different construction prevails with respect to private authorities and authorities for the advancement of public justice. * * * We shall not advance public justice by saying that though a majority of the triers who have had the advantage of all the information to be derived from the whole six who compose the tribunal, are of opinion that the leather is unserviceable, still any one man shall have it in his power to prevent a finding by holding out against the rest.

All six must undoubtedly try; but it does not therefore follow that they must all decide the same way. Each man is, after due examination and inquiry, to decide according to the best of his judgment, and the question is to be determined by the opinion of the majority."

Following these authorities and others in our own country, Chancellor KENT lays down the rule, 2 Kent Com. 633, to be: "And if the authority, in a matter of mere private concern, be confided to

more than one agent, it is requisite that all join in the execution of the power; though the cases admit the rule to be different in a matter of public trust; and if all meet in the latter case, the act of the majority will bind." To the same effect is Story's Agency, § 42, and note. The principle has been applied in a large number of adjudicated cases in this country. We shall only advert to some of the principal decisions.

In *Jewett vs. Alton*, 7 N. H. 253, a case which in its facts has no special application here, the law is thus stated by GREEN, J.: "The rule is, that when an authority is given by law to three or more persons it may in general be executed by a major part of the persons to whom it is delegated. But where individuals or corporations give an authority jointly to three or more persons, in order to bind the principal all the agents must act." In *Patterson vs. Leavitt*, 4 Conn. 50; 10 Am. Dec. 98, the court says: "It is established beyond a question that an authority given for a private purpose, to a number of individuals, is joint, and must be strictly pursued. On the other hand, if the power be of a public nature, the majority may perform the act delegated; the power being considered as joint or several." This was a case of a private arbitration, and an award by two of the three arbitrators, the third dissenting, was held invalid.

In *Scott vs. Detroit Young Men's Society's Lessee*, 1 Doug. (Mich.) 119, it was held, that: "As a general proposition it is undoubtedly true that where several persons are appointed to execute a power or trust, and no authority is given to a less number than the whole to act, all must join in its execution. A distinction is drawn, however, between a mere private trust or power and a power of a public nature conferred by law. In such cases, if all are present to deliberate, although a majority only assent to the act, it is unquestionably good." In *Commissioners of Allegheny Co. vs. Lecky*, 6 S. & R. (Penn.) 166 S. C. 9 Am. Dec. 418, it was held that where the commissioners of the county had authority under a statute to purchase a site for a jail, the power might be legally exercised by two of them without the concurrence of the third; that "the rule that requires all to join in the execution of a power has never been applied to public business of a judicial nature, nor to public business of a deliberative nature though not strictly judicial." See, also, *Commonwealth vs. Canal Commissioners*, 9 Watts (Penn.) 466, 471; *Cooper vs. Lampeter Township*, 8 Id. 125; *Kingsbury vs. School District*, 12 Metc. (Mass.) 99, 105; *Charles vs. Hoboken*, 3 Dutch

(N. J.) 203; *Curtis vs. Butler Co.*, 24 How. (U. S.) 435, 450; *Jones vs. Andover*, 9 Pick. (Mass.) 145, 151, and *Cooley vs. O'Connor*, 12 Wall. (U. S.) 391. In *Downing vs. Rugar*, 21 Wend. (N. Y.) 178, 182, s. c. 34 Am. Dec. 223, one of two overseers of the poor acted in the performance of a merely ministerial act, and it was held that the assent of the other was to be presumed. COWEN, J., in the opinion, says: "The rule seems to be well established that in the exercise of public as well as private authority, whether ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public and the number such as to admit of a majority, that will bind the minority after all have duly met and conferred."

The necessity for a meeting and deliberation of all persons appointed to perform a duty calling for the exercise of discretion, seems to be recognized by all the cases, unless it be obviated by circumstances which do not exist in the case at bar. In *Crocker vs. Crane*, 21 Wend. (N. Y.) 211, 218, s. c. 34 Am. Dec. 228, the court, COWEN, J., says: "It has long been perfectly well settled, that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide." This was a case where commissioners were named in the act of incorporation of a railroad company, "to open books, receive subscriptions, and distribute stock among subscribers as they shall deem most conducive to the interests of the corporation." It will be observed that the duty with which these commissioners were charged, was one in which the public at large had no direct interest, except as it might voluntarily become interested in the stock of the corporation, and the distinction in this case seems to be based upon the fact, that the decision was not alone to affect parties to the transaction or adjudication in the first instance, and who might have had some voice in the selection of the board, and the scope of its powers, but that the board was a creation of the law, and entrusted with duties of a judicial nature, in the discharge of which it necessarily had power to affect and bind parties who might subsequently come in, with notice of the terms and scope of the act.

In *Crocker vs. Crane, supra*, reliance is had upon the decision in *Ex parte Rogers*, 7 Cow. (N. Y.) 526, in which the Court upheld the action of a majority of a board consisting of a canal commissioner

and two assessors, elected by the state senate to assess damages occasioned by canals. In the opinion *per curiam* it is said, "But in regard to a public judicial body it is clearly settled that though no provision be made giving a binding effect to the decision of a majority, yet where they all convene and act the majority may decide, notwithstanding the express dissent of the minority." Mr. Waterman's note (*a*) to this case states the law to be that, "Where a public act is to be done by three or more commissioners, appointed in a statute, and a competent number have met and conferred, though they separate and a majority do the act without the presence of the others, the act seems good in construction of law; though it is otherwise where there is a positive statute or charter requiring that a full board should be present at the consummation." The rule is in substance re-stated in *Johnson vs. Dodd,* 56 (N. Y.) 76, and also in *Groton vs. Hurlburt,* 22 Conn. 178. It is applied to ordinary town commissioners of highways in *Babcock vs. Lamb,* 1 Cow. (N. Y.) 238.

The general rule, that in matters of public interest the majority of those upon whom the power or authority is conferred may act, is recognized in *Baltimore Turnpike,* 5 Binn. (Penn.), 481; *Louk vs. Woods,* 15 Ill. 256; *Walker vs. Rogan,* 1 Wis. 597; *Jefferson County vs. Slagle,* 66 Penn. 202; *Austin vs. Helms,* 65 N. C. 560; provided all meet and confer; but not when the minority is ignorant of the transaction, and has no opportunity to exercise its legitimate influence in the deliberation. (*Schenck vs. Peay,* 1 Woolw. 175); or when the act in terms requires the presence and concurrence of all. *New York Life Ins. and Trust Co. vs. Staats,* 21 Barb (N. Y.) 570; *Powell vs. Tuttle,* 3 Comst. (N. Y.) 396; *People vs. Coghill,* 47 Cal. 361, which only says all must be present under the statute in question. In New York this is recognized to be the common law rule, and is also expressly enacted by statute. 8 Abb. Pr. (N. S.) 234; 38 How. Pr. 508; 10 Abb. Pr. 233. In *Pell vs. Ulmar,* 21 Barb. (N. Y.) 500, one of the two public loan commissioners acted in the matter of foreclosure of a mortgage, and the court holding this insufficient says, STRONG, J.: "Whereas powers are conferred upon a number to act collectively, and especially in matters involving any discretion, it is an indication that the association if not the concurrence of all is essential." And in *People vs. Walker,* 23 Barb (N. Y.) 304, which has no application to the case at bar in its facts, MITCHELL, J., in a very able and exhaustive opinion, says: "When persons are appointed by the law to act as

special tribunals of a *quasi* judicial character * * * both parties are entitled to the presence of all the judges and to have the benefits of the consultation of each with every other. All must therefore meet together, and consult, but then a majority may decide. In *Attorney General vs. Davy*, 2 Atk. 212, three out of the twelve persons had power to choose a chaplain. Two of the three chose a chaplain, the third dissented, and the question was whether this was a good choice. It was held to be good." The learned judge sums up his conclusions from a consideration of all the cases: "First, that where a private authority is conferred, all must be present, and all must concur, unless provision be otherwise made. Second, that where a public authority is conferred on individuals (not on a court) who are to act judicially, all must confer together, as that is the object of having more than one or two, but that a majority may decide." In *People vs. Nichols*, 52 N. Y. 478; s. c. 11 Am. Rep. 734, where an act provided for the purchase by the state of certain relics of George Washington, the money appropriated, to be paid only upon the certificate of three persons named in the act that the relics were genuine, and that in their judgment it was desirable that they should be placed in the museum of the state library, the three met and one refused to certify. The other two signed a certificate in which his refusal to concur with them was set forth. The certificate was held sufficient, following *Ex parte Rogers*, on the ground that the matter was of public concern, and "a majority act for the whole when all have met." This holding, PECKHAM, J., says, in the opinion, would be in accordance with common law principles, but is also within 2 R. S. 555, § 27.

The rule has been applied to committees of towns. In *Martin vs. Lemon*, 26 Conn. 192, a committee of a town had authority to remove obstructions and nuisances. One acted without the advice or concurrence of the others and it was held insufficient. STORRS, C. J. in the opinion, lays down the common law rule as follows: "If the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together and be present when the act is performed, in which case a majority of them may perform the act; or after all of them have been notified to meet, a majority of them having met will constitute a quorum or sufficient number to perform the act, and according to some modern author-

ities, the act may be legally done by the direction or with the concurrence of a major part of the quorum so assembled;" citing *Damon vs. Granby*, 2 Pick. (Mass.) 345, in which the town chose a committee to superintend the building of a church, and it was held that a majority of such committee constituted a quorum, and that a majority of the quorum might act as the committee. That a majority of the town committee may bind is held in *Hanson vs. Dexter*, 36 Me. 516, and *Gallup vs. Tracy*, 25 Conn. 10. Also to assessors. In *Williams vs. School District*, 21 Pick. 75, s. c., 32 Am. Dec. 243, which was a case where two of three school district assessors acted, and the third did not participate and was not notified, but had been previously invited by one of the two to assist in the assessment, and had then and repeatedly declined to have anything to do with it, SHAW, C. J., says: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, if so prescribed, or by the rules and regulations of the body itself, if there be any, otherwise if reasonable notice be given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum. In the present case all three having had notice and an opportunity to act, the act of two is sufficient."

In New York it is held generally that where power is vested in a board of assessors composed of three, all must be notified to meet and consult, though a majority may decide. *Matter of Beekman*, 1 Abb. Pr. 449; 31 How. Pr. 16; *Matter of Palmer*, Id. 42.

The case of *George vs. School District*, 6 Met. (Mass.) 497, is pertinent, as there the third assessor, like the third commissioner in the case at bar, failed to qualify by taking the oath. SHAW, C. J., in the opinion, says: "It appears by the facts stated that three assessors were duly elected by the town, at their annual meeting; that two of them were forthwith sworn, and thereby became qualified to act; but that the other one was not sworn, and when notified of his election, made no reply; that he never in form declined to accept the office, but when called on by the other two to act with them, he sent notice to them declining to act. But he gave no notice of this to the town, and the town did not proceed to treat his neglect to take the oath as a vacancy, by choosing another in

his stead. The law requires the town, at their annual meeting, to choose three or more assessors. Under these circumstances the Court are of opinion, that when three assessors are duly chosen by the town, there is a board of assessors. Each is an assessor. But until qualified by taking the oath he is not competent to act. If a majority do qualify by taking the oath, and the third has not taken the oath, still, if he has notice of their proceeding to execute the office, and decline to take the oath and act with them, their acts will be good, in the same manner as if he had taken the oath and declined to act with them; because he is an assessor and the office is full. * * * * There is a board, and of these, by force of the statute as well as by long usage, the majority may act." In our state the general rule has been stated and applied in *Newel vs. Exr. of Keith,* 11 Vt. 214; *Wolcott vs. Wolcott,* 19 Id. 37; *Hodges vs. Thacher,* 23 Id. 455.

The rule of law being clearly established and the distinctions clearly and sharply defined, it only remains to apply them to the commissioners in the case at bar.

Were the commissioners provided for by the act of 1867, and named in the instrument of assent of the town of Mount Tabor, private agents, or clothed with a power, trust, or authority for merely private purposes? We think not. They represented no party or interest but the town which is a public corporation, and the inhabitants thereof. Were they then public officers? It is said upon the authority of numerous cases, that every office is a public office, the duties of which concern the public. In *Bradford vs. Justice's Inferior Court,* 33 Ga. 332, the following excellent definition of a public officer is given: "When an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions, concerning the public, assigned to him by law, he must be regarded as a public officer." In *People vs. Hayes,* 7 How. Pr. 248, commissioners to lay out a road were held to be public officers, and in *People vs. Comptroller,* 20 Wend. (N. Y.) 596, commissioners appointed by the governor, secretary of state, and comptroller to contract for and superintend the erection of an asylum, were held to be public officers, the question being upon their removal.

Whether the commissioners here were strictly public officers, however, is not material, for the legal distinction which determines the rule to be applied is not based upon the legal character of the

board, but upon the origin and nature of its authority and the character of the duties imposed therewith. We think they, at all events, come clearly within the definition in *Williams vs. School District, supra,* of "a body or board of officers constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law;" and in *Crocker vs. Crane, supra,* of a board of commissioners appointed by statute to decide a matter. These commissioners are officers appointed by the statute, which leaves their selection to the majority in numbers and amount of the legal taxpayers of the town. They are to act under an oath of office, and to perform certain duties, the immediate object and purpose of which is to obtain for the town better railroad connections and facilities. That a railroad is a public work and interest has long been established beyond a question. Jones' Railroad Securities, Ch. 7; 1 Dill. on Mun. Corp. 219 *et seq.*, and authorities cited; also *Bennington vs. Parks,* 50 Vt. 178. In the discharge of these duties they were to act as the agents of the town, and were given power to make contracts which should bind the town, and to execute a certificate which should be conclusive evidence against the town. Although a town may be small, it is none the less a public corporation and its inhabitants a "public." *Village of Winooski vs. Gokey,* 49 Vt. 282. We think these commissioners were officers created by law, to discharge duties and execute an authority involving deliberation and the exercise of discretion, and of a purely public character, and that they therefore come clearly within the well-established, common-law rule which gives validity to the decision and act of the majority when all have met and conferred.

[Omitting a statutory consideration.]

We must hold that the certificate of a majority of the commissioners named in the instrument of assent of the town of Mount Tabor, all having met and deliberated, is a legal and valid certificate in compliance with the requirements of the law, and conclusive evidence of the facts set forth in it. The evidence offered by the defendant to impeach the truth of those facts was therefore properly excluded.

The signing of the bonds by two of the three select men was sufficient under sec. 92, ch. 15, Gen. Sts.

The law being as we have held, none of the other proof offered by the defendant would constitute any defense to the bonds or

coupons in the hands of a *bona fide* holder, and it was therefore properly excluded.

Judgment affirmed.

BARRET and POWERS, JJ., dissented.

(154 MASSACHUSETTS, 277.)

McNEIL vs. BOSTON CHAMBER OF COMMERCE.

(Supreme Judicial Court of Massachusetts, September, 1891.)

Action to recover damages for the breach of an alleged agreement to employ the plaintiff as the lowest bidder to erect the new chamber of commerce for defendant, which agreement was entered into with him by a building committee appointed under the following vote, passed on October 9, 1889, by the defendant's stockholders: Voted that a committee of five be appointed by the chairman of this meeting, of whom the president shall be one, with full powers and authority to procure plans and specifications for a building, and make all contracts for the erection and completion of the same, subject to the approval of the directors.

Five different builders had been selected by the committee from whom to solicit bids, but four of them refused to bid under the terms proposed. Thereupon, on March 15, 1890, a conference was had between the builders and four members of the committee, at which certain changes in the terms were agreed upon, and it was contended that these four members then agreed, upon behalf of defendants, to accept the lowest bid, in case the building was built substantially in accordance with the plans and specifications.

The jury found specially (1) that the committee did make the contract as alleged; (2) that it was approved by the directors; (3) that the contract was within the ostensible authority of the committee; and, (4) that the building, as finally contracted for, was a building substantially in accordance with the plans and specifications.

R. M. Morse, Jr., and *C. E. Hillier*, for plaintiff.

R. Stone, for defendant.

ALLEN, J. (After determining that there was evidence upon which the first finding might be sustained.) The defendant

further contends, that the building committee were joint agents of the defendant, and that the four members who were present at the conference of March 15 could not execute the power which was delegated to the whole committee, consisting of five members, jointly. It does not clearly appear that this point was taken at the trial, and it is not noticed in the charge of the presiding judge; but we have considered it. Where special agents are appointed to act jointly in the execution of a particular power, it has often been held that the action of all is necessary, in order to execute the power properly. This rule, however, is subject to many qualifications or exceptions. It is well understood that public agents may usually act by a majority. So, also, it has been settled that a majority of the directors of a corporation constitute a quorum and a majority of the quorum may act. *Sargent vs. Webster*, 13 Met. 497, 504; 46 Am. Dec. 743; *Edgerly vs. Emerson*, 23 N. H. 555; 55 Am. Dec. 207; *Wells vs. Rahway White Rubber Co.*, 4 C. E. Green, 402.

Generally speaking, a committee of a corporation is subject to the same rules as the directors. *State vs. Jersey City*, 3 Dutch. 493; *Junkins vs. Union School District*, 39 Maine, 220. It would be very inconvenient in practice if a committee of this character, whose duties involve many acts in carrying out the general purpose of their appointment, could do nothing if a single member should be absent. There is sufficient precedent for holding that a majority may act, and such is the better rule. *Kupper vs. South Parish in Augusta*, 12 Mass. 185; *Damon vs. Granby*, 2 Pick. 345; *Hayward vs. Pilgrim Society*, 21 Pick. 270, 275, 277; *Haven vs. Lowell*, 5 Met. 35, 42; *Weymouth & Braintree Fire District vs. County Commissioners*, 108 Mass. 142. Moreover, there was evidence from which the jury might infer the assent of Mr. Speare, the absent member of the committee, to what was done by his associates. He went away, temporarily, to New Orleans, leaving the business in their hands. But on his return it expressly appears that he had a conference with them, or with some of them, and that they undertook to tell him what had been done. He denies, to be sure, that what they told him was in accordance with what the plaintiff contends and what the jury have found to be the fact. The significant fact, however, that they undertook to tell him the result of the conference in respect to the right of the committee to reject any and all bids, is testified to by Mr. Speare. He says: "They told me they had expressly reserved that." If,

in point of fact, the reservation of this right was accompanied with the qualification that they would accept the lowest bid in case they should build substantially in accordance with the plans and specifications submitted, the jury might think it a natural inference that at that time, before any controversy had arisen as to accepting the plaintiff's bid, Mr. Speare's associates told him all that had been agreed to on this head, though Mr. Speare had forgotten a part of it at the time of testifying. Mr. Lothrop's testimony tends to support such an inference. He said: "Before the meeting, I stated to Mr. Blaney (a member of the building committee) and Mr. Speare, that in my opinion the right to reject any and all bids passed [ceased?] after they had selected five from the many mechanics who had been recommended; and I was assured by them that if any one of these parties whom they had selected, and whom they supposed to be responsible, should be the lowest bidder, his bid would be accepted, and it was on that condition that I estimated, and I should not have figured on any other." He further testified that, in a private conversation, perhaps a different one, before that meeting, Mr. Speare said he would not consent to give up the right to reject all bids. It is further to be observed, that the chief reason assigned by the members of the committee who were present at the conference why they did not wish to give up the right to reject any and all bids was, that they were not willing to be bound absolutely; that the cost of the building might be too much for their means, so that a substantial change of plan might be necessary, or possibly the erection of the building given up entirely; and that the lowest bid might be entirely above the views of the committee, so that they were unwilling to consent to accept it unconditionally. Mr. Speare himself testifies that he gave to Mr. Lothrop two reasons why the committee would not give up the right to reject all bids. The first was, that the lowest bid might be a sum which the directors would not think advisable to spend to erect a building. The second was, that it was the directors who would be the final arbitrators whether the committee should award the contract, and therefore the committee would have no right to give up the right to reject any and all bids. Mr. Lothrop, on the other hand, testified very explicitly and in detail, that while Mr. Speare in conversation had mentioned the names of the committee to him, he (Mr. Lothrop) did not know then, nor, at the time of testifying, whether the action of the committee must be approved

by any other board or body. Looking at all the testimony, if the objection now urged had been distinctly presented, as a question of fact at the trial, it must have been left to the jury to determine whether Mr. Speare assented to the terms of the contract, by which, as found by the jury, his four associates purported to agree to accept the lowest bidder, in case the building should be built substantially in accordance with the plans and specifications submitted. Their finding that the contract was approved by the directors must have involved the finding that it was approved by Mr. Speare. And this finding might well be reached without implying any intentional misstatement on his part.

The remaining questions are whether there was sufficient evidence to warrant the second and third findings, or either of them, that such contract, if made by the committee, was approved by the directors, and was within the ostensible authority of the committee. If either of these was supported by the evidence, it is enough for the plaintiff's purposes, and most if not all, of the evidence relating to the second finding bears also upon the third. The plaintiff contends that it was within the ostensible authority of the committee to fix the terms upon which it would receive bids, and to make the agreement which is embodied in the first finding of the jury without any reference to an approval by the directors. He urges that this was within the ordinary province of a building committee; and that in this instance the directors knew that there was to be a competition for bids; that this competition was to be limited to five selected builders, and that the committee would fix the terms of it; that the directors were well aware that the committee was going on to attend to all these matters; that a vote had already been passed by the directors, authorizing the committee to make leases in the new building; that they also knew that the architects had been selected, that the plans were hanging up in the office; that the erection of the new building was the most important subject which the board of directors or the chamber of commerce had under consideration during this period, that it was a subject of constant talk; and that no director ever objected to the committee's undertaking to fix the terms of the competition among the builders, or questioned its power to do so, till after a letter from the plaintiff's attorney threatening an action at law. There was testimony in support of these various propositions. So far as appears, no one of the bidders doubted the power of the committee to act in the matter. The

committee assumed to make changes in the terms of competition at its own will. There is nothing to show any suggestion to any of the bidders in respect to the need of consulting the directors, except in Mr. Speare's testimony, already referred to, of his conversation with Mr. Lothrop. The notice to bidders held out the building committee as having the power to act in the premises. No mention of the directors was made in it. The board of directors had regular monthly meetings. Mr. Speare was president of the board, and was upon the building committee. He testified: "It was known to the directors, in a general way, that specifications, notice to bidders, and other details preliminary to obtaining bids and making the contract, were being attended to by the committee and the architects." "Was it not the understanding of the directors that there was to be a competition?" "Yes, sir." "How was that known to them?" "Simply in a general way; I presume at a meeting of the directors I had told them." He added later, that the board of directors knew that the committee was trying to get bids, and that no effort was made to inform bidders that they could not safely deal with the committee. According to the strict letter of the original vote, the committee could not even procure plans and specifications except subject to the approval of the directors. It was allowed, however, not only to procure plans and specifications, but to employ the architects without formally consulting the directors.

Without dwelling further upon details of evidence, the jury might properly find that the committee itself, believed that it was authorized to go on, as it did, without consulting the directors as to the details, and that the directors were aware in a general way of what the committee was doing. It seems to us that the jury, as a result of the whole testimony, might properly come to the conclusion that the contract was within the ostensible authority of the committee, and that the bidders had a right to assume that the defendant would be bound by the contract of the committee as to the terms of the bidding.

The doctrine as to ostensible authority is thus stated in *Bronson vs. Chappell*, 12 Wall. 681, 683: "Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner." Circumstances may warrant an inference

that acts of a committee, openly done and extending over a considerable period of time, were known and assented to by those who appointed the committee. The directors represented the corporation, and if the directors knew and by silence acquiesced in the acts of the committee, that is enough. The vote of the stockholders would show what in the first instance was the actual authority of the committee, but the course of the directors might be considered in determining its ostensible authority. A secret or unknown limitation of authority imposed by the stockholders would not control an apparent authority from the directors, since the business was within the scope of the general authority of directors. This was clearly left to the jury by the presiding judge, in terms to which the defendant did not except, and which appear to be unexceptionable. The decisions cited by the plaintiff afford various illustrations of the application of the rule of law as to apparent authority in an agent. The rule itself is not open to doubt. *Fay vs. Noble,* 12 Cush. 1, 17, 18; *Lester v. Webb,* 1 Allen, 34; *Ayer vs. R. W. Bell Manuf. Co.,* 147 Mass. 46; *Insurance Co. vs. McCain,* 96 U. S. 84 (*post,* ——); *Mining Co. vs. Anglo. California Bank,* 104 U. S. 192. See, also, *Case vs. Bank,* 100 U. S. 446, 454. The defendant does not now insist that the evidence did not warrant the fourth finding of the jury.

The result is, that there should be, judgment for the plaintiff on the finding.

(37 MINNESOTA, 98, 5 Am. St. Rep. 827.)

DEAKIN vs. UNDERWOOD.

(Supreme Court of Minnesota, June, 1887.)

Action for specific performance. The opinion states the facts.

John B. & W. H. Sanborn, for appellant.

Uri L. Lamprey, for respondent.

MITCHELL, J. This was an action to compel specific performance of a contract for the sale of real estate. Plaintiff alleges that the defendant made the contract "by A. B. Wilgus, his duly authorized agent and attorney in fact." The contract is attached

as an exhibit to the complaint, and is signed, "O. W. Underwood, by A. B. Wilgus, Agent."

1. It appears from the evidence that the authority to sell was given to the firm of A. B. Wilgus & Brother, a partnership composed of A. B. Wilgus and E. P. Wilgus. It is claimed that, upon this state of facts, there was a failure of proof. But the material allegation of the complaint was that defendant had made this contract with plaintiff. It was not necessary to allege that it was made through an agent. It would have been enough to declare upon it generally as of the personal act of the principal. The substance of the issue was not whether defendant had made the contract through an agent, but whether he had made it at all. Hence it cannot be said that there was a failure of proof. The most that can be possibly claimed is, that there was a variance between the allegation and proof, but which could not, in this case, have misled the defendant to his prejudice, and therefore is not material.

2. Defendant further contends that the authority to sell being to the firm of A. B. Wilgus & Brother, which was composed of two members, this authority could only be executed by the two jointly, and not by one separately, so as to bind the principal. In support of this contention, he invokes the well-known general rule of the common law, that where authority to do an act is conferred upon two or more agents, the act is valid to bind the principal only when all of them concur in doing it; the power being joint and not several. *Rollins vs. Phelps,* 5 Minn. 463. Even where the authority is given to several agents, this rule is not so rigid and inflexible as to overcome the apparent intention of the parties to the contrary. Story on Agency, §§ 42, 43; *Hawley vs. Keeler,* 53 N. Y. 114 (*ante,* 50). But we think the rule has no application where the authority is given to a partnership as such. Each member of a partnership is the agent of the firm, and all the partners are jointly accountable for the acts of each other; and where a person appoints a partnership as his agent, he must be deemed to have done so with reference to these rules of law. When a person delegates authority to a firm, it is an appointment of the partnership as his agent, and not of the individual members as his several and separate agents. Hence each partner may execute, and the act of one is the act of the firm, and in strict pursuance of the power. *Gordon vs. Buchanan,* 5 Yerg. (Tenn.) 71.

But it is claimed that, conceding this, he must do it in the name

of the firm, and that if, as in the present case, he uses his individual name, it is not the act of the partnership, and will not bind it. The defendant seems to overlook the fact that the contract is the act of the principal, and not of the agent, and that the party to be bound is the former, and not the latter. Hence the important question is, whether the principal's name has been signed to the contract by one having authority to do so. That in this case A. B. Wilgus, as a member of the firm of A. B. Wilgus & Brother, had, by virtue of the authority given the firm, power to execute this contract in the name of the defendant, cannot be questioned, and it is wholly immaterial whether to that name he added "by A. B. Wilgus & Brother," or "by A. B. Wilgus," or nothing at all. An agent, authorized to sign the name of his principal, effectually binds him by simply fixing to the instrument the name of his principal, as if it were his personal act. The particular form of the execution is not material, if it be done in the name of the principal, and by one having authority in fact to execute the instrument: *Berkey vs. Judd*, 22 Minn. 287, 302; *First National Bank vs. Loyhed*, 28 Id. 396; *Devinney vs. Reynolds*, 1 Watts & S. (Penn.) 328; *Forsyth vs. Day*, 41 Me. 382.

3. The authority to the firm was to sell for one-half cash, and the other half payable on or before one year. They sold for one-half cash and the other half payable in one year. It is claimed that this was unauthorized, and therefore the principal is not bound. The terms of the contract as executed, so far as they affect the rights of the defendant, were in legal effect the same as those authorized. By each he would be entitled to demand payment in one year, and not before. The distinction between this case and one where the facts are exactly reversed (such as *Jackson vs. Badger*, 35 Minn. 52) will be apparent on a moment's reflection. * * *

We therefore think that the evidence shows a binding contract by the defendant to sell and convey, and shows no valid reason why he ought not to and cannot perform.

Order reversed.

NOTE—As to the acts of one of a firm of insurance agents; *Purinton vs. Insurance Co.*, 72 Me. 22; *Gordon vs. Buchanan*, 5 Yerg. (Tenn.) 71; *Kennebec Co. vs. Insurance Co.*, 6 Gray (Mass.) 204; *Newman vs. Insurance Co.*, 17 Minn. 123.

As to acts of one of a firm of attorneys, *Jeffries vs. Insurance Co.*, 110 U. S. 305.

CHAPTER IV.

OF THE APPOINTMENT OF AGENTS AND THE EVIDENCE THEREOF.

I.

AUTHORITY IMPLIED BY LAW.

(134 MASSACHUSETTS, 418.)

BENJAMIN vs. DOCKHAM.

(Supreme Judicial Court of Massachusetts, March, 1883.)

Action for milk sold to defendant's wife. The opinion states the facts. Judgment below for plaintiff.

C. P. Weston, for defendant.

S. H. Dudley and *W. P. Dudley* for plaintiff.

HOLMES, J. The plaintiff's declaration was for milk delivered to the defendant by the plaintiff at the defendant's request. His proof was of a delivery to the defendant's wife, who was living apart from her husband, without means of support, by reason of his cruelty. The only ground of exception which we are asked to consider is, that there was a variance between the declaration and the proof. If there were such a variance, as the case has been tried on its merits, and it appears from the statement of the defendant's counsel himself that there can have been no surprise, an amendment would be allowed. *Peck vs. Waters,* 104 Mass. 345, 351; *Cleaves vs. Lord,* 3 Gray 66. But we think no amendment is necessary. The allegation of delivery to the defendant would seem to be sufficient in a common count, even when the delivery was to a third person at the defendant's request. *Bull vs. Sibbs,* 8 T. R. 327, 328; 2 Chitty Pl. (7th ed.) 47 n. l.; (6th ed.) 56 n. w. *A fortiori* when it was to the defendant's wife, who at common law is one person with her husband. *Ross vs. Noel,* Bull. N. P. 136; *Ramsden vs. Ambrose,* 1 Stra. 127. And in those cases where

the law authorizes a wife to pledge her husband's credit, even against his will, it creates a compulsory agency, and her request is his request.

Exceptions overruled.

(15 CONNECTICUT, 347, 39 AM. DEC. 384.)

BENJAMIN vs. BENJAMIN.

(Supreme Court of Errors of Connecticut, June, 1843.)

Trespass for cutting, removing and selling certain grass growing on plaintiff's land. Defendant justified on the ground that the act was authorized by plaintiff's wife. Defendant offered evidence tending to show that in 1836 plaintiff left the state and remained absent until 1840; that he left his wife and children living on the farm in Connecticut, on which the grass in question was grown, making little provision for their support, and that he wrote to them only twice during his absence; that he left some stock on the farm; that he did not commit the management of the farm to any other person than his wife, but that she alone managed the same during his absence, employing laborers, who were paid by the plaintiff on his return, took care of the cattle and hired them out or lent them at pleasure, cultivated the land, kept up the fences, etc., and that plaintiff had not disapproved of any of her acts in that regard since his return; that she agreed that defendant might cut and remove the grass under an attachment taken out against the plaintiff, sell the same on execution and apply the proceeds to his debt, for the reason that she had no means of caring for the hay herself. Verdict for plaintiff, and defendant moved for a new trial.

Hungerford and *Chapman*, for the motion.

Toucey, contra.

STORRS, J.: The justification set up by the defendant, for doing the acts complained of, in respect to the cutting and carrying away the grass in question, depends on the validity of the authority given by the wife of the plaintiff. It is not claimed by the defendant, that such authority is valid, by virtue of the power which the wife has, in certain cases, to charge her husband, in

procurement of necessaries for herself or the family. For it was not for the relief of any part of the family, that she, in the present case, authorized or procured the defendant to do the acts complained of, nor could they, in any measure, contribute to that purpose. Neither the grass, nor its avails, went to their use; nor was the arrangement respecting it, made with any such view; but solely for the benefit of others. Although, therefore, it should be conceded, that the wife, under the circumstances claimed to be proved by the defendant, would have had the right, if necessary for the support of herself or the family, to dispose of the grass and apply the avails to that purpose; and that her husband would have been bound by such an appropriation of his property; it would not go to show, that the disposition of the property, in the present case, was valid or binding on him, no such cause existing, and the disposition being for no such purpose. Hence it is wholly unnecessary to consider the subject of the liability of the husband, in any case, for contracts entered into, through the instrumentality of the wife, for necessaries furnished on his credit. The case has not been attempted to be placed on the principles applicable to those cases. The question here, therefore, does not respect the liability which the law imposes on the husband, independent of any express assent on his part, or notwithstanding his express dissent; but is purely one of agency—of an authority possessed by the wife, to act on his behalf, in relation to his general concerns.

A wife, as such, has no original or inherent power to make any contract, which is obligatory on her husband. No such right arises from the marital relation between them. If, therefore, she possesses a power in any case, to bind him, by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent—although such assent may be precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, the relation between them and the consequences of that relation, are analogous to those in the ordinary case of principal and agent. And that she has the capacity to be constituted, by the husband, his agent, and to act as such, equally with any other person, there is no doubt. In Fitz. N. B. 120 G, the law is thus laid down: "A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto the bailiff or servant to buy or sell for him; and so the contract of the wife, if he give such authority to his wife, otherwise not." In

Manby vs. Scott, 1 Mod. 125, it is said by Mr. Justice HYDE, that "a *feme covert* can not bind or charge her husband, by any contract made by her, without the authority or assent of her husband, precedent or subsequent, express or implied." The law on this subject is stated, with great clearness and precision, by Selwyn, in his Nisi Prius, page 288, where he treats of the liability of the husband as to contracts made by the wife during coverture. After stating that the relation of husband and wife is, in respect of the wife's contracts, binding the husband, analogous to the relation of master and servant, he says: "Indeed, in contemplation of law, the wife is the servant of the husband;" and, after citing the above passage from Fitzherbert, he says: "From this passage it appears that the husband is not liable to his wife's contracts, unless he has given his authority or assent;" and adds, "it is incumbent, therefore, on a creditor, who brings an action against the husband upon a contract made with his wife, to show, that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such assent has been given; and in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise; for the wife has not any power originally to charge the husband." These principles are so plainly in accordance with the whole current of the authorities, that a reference to some of them only is necessary; Vin. Abr. tit. Baron & Feme, E. A.; 5 Pow. on Con. 57, 58; *Hunt vs. De Blaquiere*, 5 Bing. 550; *Rotch vs. Miles*, 2 Conn. 638; 1 Bac. Abr. 489; *Manby vs. Scott*, 1 Lev. 4; Bull. N. P. 136; *Norton vs. Fazan*, 1 Bos. & Pul. 227, N. by Day; *Etherington vs. Parrot*, 1 Salk. 118; s. c. 2 Ld. Raym. 1006; Clancy 23.

But, although these principles are universally acknowledged, it is not always easy to determine what amounts to proof of the husband's assent, where it is claimed to be implied merely, as will be obvious, by looking at those cases especially in which questions have arisen as to the liability of the husband for supplies furnished to his wife, when the husband had abandoned or deserted her, or turned her from his doors, or where there was an agreement for a separation between them, with an allowance for her support. Whatever difficulty there may be, in the present case, is of that character.

In this case, no authority to make the contract, claimed to be proved respecting the hay, was conferred expressly, by the plaintiff upon his wife. This question of fact was submitted to the jury

who found, that he did not constitute her his agent generally, to manage his business, nor specially authorize her to make the contract in question, nor subsequently ratify such contract. The question, then, and indeed the only one made on the argument, is, whether, from the facts claimed to be proved by the defendant, the law implies any power in the wife of the plaintiff to make the contract in question in his behalf.

The defendant claims, in the first place, that such a power is implied, because it is, in its nature, necessarily incidental to the authority conferred on the plaintiff's wife to take charge of his farm, and manage and superintend it. It is a familiar principle of the law of agency, that every authority given to an agent, whether general or special, express or implied, impliedly includes in it, and confers on such agent, all the powers which are necessary, or proper, or usual to effectuate the purposes for which such authority was created. It embraces the appropriate means to accomplish the desired end. This principle is founded on the manifest intention of the party conferring such authority, and is in furtherance of such intention. The rule is most fully and minutely illustrated, by examples and authorities, in Judge STORY'S treatise on Agency, to which it is only necessary to refer. As applicable to the case before us, the plaintiff's wife, on the ordinary principle of agency, would have the power to do whatever is necessary or proper, in the care and management of the farm intrusted to her, such as keeping in order the buildings, fences and implements of husbandry, cultivating the land, and preserving the crops, and perhaps disposing of such crops, if necessary to enable her to do these things; and generally to do whatever is necessary and proper in order to execute the trust reposed in her; and the usual course of such an employment might be shown, in order to ascertain what was thus necessary and proper, and the character and design of the trust. Further than this, her power would not extend.

It is scarcely necessary to say that, within these principles, she has no right to dispose of her husband's property in her possession, in the extraordinary and injurious manner, and for the purpose claimed to be proved by the defendant. If it should be held that such an agent might make such a contract, it would be difficult to stop short of investing her with a general and unlimited authority as to all his affairs. The very case of intrusting another with the superintendence of a farm, is put in the books on the civil law, under which it was held, that an agency of that description does

not authorize the agent to sell the property of the principal for any purpose, unless it be of a perishable nature. Whether we should restrict his powers within limits so narrow, it is unnecessary to inquire; but on no principle can we extend them as is claimed in the present case.

It is next claimed by the defendant, that from the marital relation between the plaintiff and his wife, the law implies a larger authority than from the ordinary relation between principal and agent, and that the power to make the contract in question is implied from such relation. We have seen that a wife, by virtue of such relation, possesses no original power to bind her husband, by her contracts made on his behalf; and that her power for that purpose must, therefore, be derivative. It appears, nevertheless, from the authorities, that the law will, in some cases, presume the wife to be the agent of her husband, when no such presumption would exist as to another person; and also will, in some cases, imply a larger authority to the wife than to an ordinary agent, and this, perhaps, whether the husband be absent from home or not; and that, in other cases, where he is absent, a presumption would arise that his wife has authority to act in his behalf, which would not exist if he were at home. But it will be found that in all such cases, these inferences are founded on the fact that it is usual and customary to permit the wife to act in such cases. It is a presumption arising from the state of society. Thus, in *Anonymous*, 1 Stra., 527, "PRATT, C. J., allowed the wife's declaration that she agreed to pay four shillings per week, for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the women." Judge REEVE, in Domestic Relations, p. 79, says: "The husband is bound to fulfill the contract of his wife, when it is such an one as wives, according to the usage of the country, commonly make. If a wife should purchase, at a merchant's store, such articles as wives in her rank of life usually purchase, the husband ought to be bound, for it is a fair presumption that she was authorized so to do, by her husband. If, however, she were to purchase a ship or a yoke of oxen, no such presumption would arise, for wives do not usually purchase ships or oxen." On the same grounds in *Church vs. Landers*, 10 Wend. 79, the wife, in the husband's absence, was presumed to have been left an agent for the hiring out of his horses: 2 Cow. Ph. on Ev. 294, n. 298. In *Spencer vs. Tisue*, Addis. (Pa.) 316, payment to the wife of a debt due to the husband in his absence, was held good for the same

reason. We do not find any adjudged case which sanctions the doctrine that the wife, whether the husband is abroad or at home, is presumed to be the agent of her husband generally, or to be entrusted with any other authority as to his affairs, than that which it is usual and customary to confer upon the wife. It would be not only unreasonable, and, as it respects the husband's interest, unsafe, but it would be going beyond what could fairly be presumed to be his intention, to extend the powers of the wife by implication or presumption further than this principle warrants; and that it justifies the contract in question cannot be claimed. We think, therefore, that the defendant's justification, founded on the authority of the plaintiff's wife, fails. * * *

New trial denied.

(26 IOWA, 297.)

McLAREN vs. HALL.

(Supreme Court of Iowa, December, 1868.)

Action for work, labor and material furnished. The transactions were had with William Hall who was claimed to be the agent of the defendant Sarah G. Hall. Defendant appeals.

Roberts & Fouke, for appellant.

Beach & Gray, for appellee.

COLE, J. * * * The husband may act as agent for the wife. In order to bind her, however, he must be previously authorized to act as her agent, or she must subsequently, with express or implied knowledge of his act, ratify it. The evidence necessary to establish a ratification by the wife, of a contract made by her husband as her agent, must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as his agent, or than as between independent parties. And this for the reason that (in the general experience of the past at least, if not in the philosophy of the present), the wife is under the control of, and subordinate to, the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation or hostile conduct towards her husband, in order to save her property from liability for his unauthorized contracts.

Of course it is necessary in every case, in order to bind her, that he should at least claim to act as her agent; and her ratification should be shown by those unmistakable acts or declarations which evince a knowledge of the contract by which she is sought to be bound, and an intention to adopt or ratify it as her own. * * *

NOTE—Husband has no implied authority to act as agent for his wife. *Price vs. Seydel*, 46 Iowa, 696; *Crawford vs. Redus*, 54 Miss. 700; *Eystra vs. Capelle*, 61 Mo. 580; *Mead vs. Spalding*, 94 Mo. 43; *Etheridge vs. Price*, 73 Tex. 597. With her authority, however, he may act as her agent. *Rankin vs. West*, 25 Mich. 195; *Arnold vs. Spurr*, 130 Mass. 347; *Lavassar vs. Washburne*, 50 Wis. 200; *Griffin vs. Ransdell*, 71 Ind. 440; *Bennett vs. Stout*, 98 Ill. 47.

(40 NEW HAMPSHIRE, 197, 77 AM. DEC. 706.)

JOHNSON vs. STONE.

(Supreme Judicial Court of New Hampshire, January, 1860.)

Trespass for taking and carrying away the plaintiff's yoke. Defense, *inter alia*, permission from plaintiff's son. The court instructed the jury that the son would have no authority to lend the yoke unless his father had authorized or ratified it.

Burns and *Fletcher*, for plaintiff.

Benton and *Ray*, for defendant.

BELL, C. J. * * * The charge, as to the supposed permission given by the boy to the officer to take the yoke, was correct. A son has no authority as such to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father, tending to show that he reposed such confidence and intrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved what he had done; but without such proof the son stands in the same position as a stranger. * * *

NOTE—See following case.

(3 MINNESOTA, 423; 74 AM. DEC. 774.)

BENNETT vs. GILLETTE.

(Supreme Court of Minnesota, December, 1859.)

Plaintiff's son had driven his horses and carriage into town to bring home the plaintiff's daughter Leodora. The son hitched the horses in front of the house where his sister was and left them there while he went to attend to some other matters. While he was gone, plaintiff's daughter, who was about 19 years of age, requested defendant, a friend of hers, to drive herself and a lady friend to a church. Defendant assented, and while driving, the horses became frightened, ran away, threw out the occupants of the carriage, demolished the carriage and killed themselves. The father brought this action against the defendant to recover for the loss. Defendant had judgment below.

Sanborn, French and *Lund,* for appellant.

Brisbin and *Bigelow,* for respondent.

FLANDRAU, J. (After stating the facts.) The relation of parent and child, existing between the plaintiff and Leodora Bennett, conferred upon her the right to use in a careful and proper manner, such property of her father as was customarily applicable to family purposes; as, for instance, the furniture of his house, and we think, the family carriage and horses, subject, of course, to those regulations which parental wisdom should dictate, and parental authority enforce. Where one person uses the property of another who is as to him a stranger, the law implies a promise to pay an equivalent for its use. Yet, where members of the same family do the same thing in the ordinary intercourse of life, no such implication will follow, but if an action can be sustained at all, an express promise must be averred and proved. In the same way, where one person performs work, labor, or services for another, with his knowledge and assent, the law will imply a promise to pay a fair remuneration for the benefit received, whereas no such presumption will arise between members of the same family in similar cases, and under similar circumstances. Can there be any doubt that the child may use the books in the father's library, hunt with his gun and dogs, sail in his yacht, and even invite a friend to participate with him in these pursuits or amusements?

We think not. The law of the land imposes the obligation upon the parent to furnish the child with the necessaries of life; and the law of nature prompts him to supply those comforts and luxuries compatible with his social position, which will refine and elevate his mind, improve and develop his body, and fit him to assume the responsibilties and duties of the citizen. When a parent furnishes an establishment for his family, the law will presume an authority in the several members thereof to enjoy it, and refer all questions concerning the internal policy of the domestic circle to the arbitrament of the social code, so long as its differences do not trench upon the rights of others.

In this case we cannot see how there was any impropriety in the daughter of the plaintiff using the carriage which had been sent into the city for her for any of the general purposes which such property is devoted to in families, either in conveying her to a friend's, or to church, as in this instance; nor do we think she exceeded the limits of a prudent exercise of her privileges, by extending them to her friends who were present. She certainly did not by so doing violate any known law of courtesy, but we think exhibited a degree of forethought and prudence in securing the services of the defendant to drive the horses, which was commendable to her judgment. We do not think the defendant can be said to have taken the property at all, or to have had it under his control, or in his custody, or possession, but he was simply a passenger at the invitation of the plaintiff's daughter, who had competent and adequate authority, by virtue of her relation to the plaintiff, to use the carriage and horses for the purpose to which they were being applied.

The case does not make out any negligence on the part of the defendant in the manner in which he drove or otherwise, and we see no principle upon which he can be made liable for the loss the plaintiff has sustained. It is one of those unfortunate accidents for which the law furnishes no redress.

The judgment of the court below is affirmed.

NOTE—See further on authority of child to act as agent for the parents; *Sequin vs. Peterson*, 45 Vt. 225, 12 Am. Rep. 194; *Burnham vs. Holt*, 14 N. H. 367; *Hall vs. Harper*, 17 Ill. 82; *Swartwout vs. Evans*, 37 Ill. 442; *Paul vs. Hummell*, 43 Mo. 122; *Owen vs. White*, 5 Port. (Ala.) 435, 30 Am. Dec. 572.

II.

AUTHORITY CONFERRED BY ACT OF PARTIES.

(33 LAW JOURNAL REPORTS, EQ. 155.)

POLE vs. LEASK.

(English House of Lords, April, 1863.)

LORD CRANWORTH. My lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency, which, I think, were sometimes lost sight of in the argument of this case at your lordships' bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but, in every case, it is only by the will of the employer that an agency can be created.

This proposition, however, is not at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted.

Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

Unless this principle is strictly acted on, great injustice may be the consequence; for, any one dealing with a person assuming to

act as agent for another, can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist, and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that any one is assuming to act for him, or that persons are proposing to deal with another under the notion that that other is his agent. It is, therefore, important to recollect constantly where the burden of proof lies. * * *

(38 MINNESOTA, 66.)

GRAVES vs. HORTON.

(Supreme Court of Minnesota, December, 1887.)

Smith & Reed, for appellant.

C. H. Childs, for defendant.

MITCHELL, J. This action was brought to recover the value of certain property, which plaintiff had exchanged with defendant for a skating rink, skates, boats, etc., situated at Spirit Lake, Iowa. Plaintiff's claim is that there was an entire failure of title to this (latter) property, because defendant had previously sold it to one McCurdy. It is not claimed that defendant had personally sold it to McCurdy, whatever was done in that regard having been done by one F. M. Horton, assuming to act as her agent. Hence, unless F. M. Horton had authority as defendant's agent to sell to McCurdy, there could have been no such sale, and plaintiff has no cause of action. The burden was on plaintiff to prove such agency.

It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance, and that the authority of an agent cannot be proved by his own statement that he is such. Applying these elementary principles, and stripping the evidence of all that is immaterial or incompetent, and giving to what remains all the force that can be claimed for it, all there is that was brought home to defendant tending to prove any such agency is that, when F. M. Horton was

in Spirit Lake, he transmitted and submitted to her in Minneapolis what purported to be a proposition from McCurdy to give for this property $1,090 in goods, and assume a mortgage on it for $385, and that she agreed to accept this proposition; that McCurdy being unable to carry this out, F. M. Horton submitted to her another proposition as coming from McCurdy, viz., to give in place of the goods 80 acres of land in Iowa; that defendant declined to accept this last proposition, and so notified McCurdy; that about two weeks after this she authorized F. M. Horton to negotiate the sale of this property to plaintiff on the terms which were finally agreed on, she herself making the transfer by executing the bill of sale described in the complaint. We have, on the other hand, the flat denials of both defendant and F. M. Horton that he ever had any authority from her to sell this property or ever was her agent for this or any other purpose.

This is really all the competent evidence there is at all bearing upon this question of agency. The acceptance of McCurdy's first proposition, which he was unable to carry out, certainly does not tend to prove authority to F. M. Horton to sell on the terms of the second, which defendant expressly declined to accept; and if any sale ever was made to McCurdy, it was on the basis of this last proposition. Hence the evidence of agency is reduced down to the fact that defendant authorized F. M. Horton to negotiate the sale to plaintiff, which she herself consummated by the execution of a bill of sale. It certainly cannot be that this is sufficient. It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such person becomes his implied agent to do *such acts*, as, for example, the case of the manager of a plantation in buying supplies for it, or the superintendent of a saw-mill, in making contracts for putting in logs for the use of the mill, which are the cases cited by respondent. It is also true, as was said in *Wilcox vs. Chicago, Mil. & St. Paul R. Co.*, 24 Minn. 269 (which involved the question of the authority of the person to whom goods were delivered to receive them), that a single act of an assumed agent, and a single recognition of it, may be of so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do *similar* acts for the principal beyond question. It is also true that the performance of subsequent as well as prior acts,

authorized or ratified by the principal, may be evidence of agency, where the acts are of a similar kind, and related to a continuous series of acts embracing the time of the act in controversy, as indicating a general habit and course of dealing; as, for example, the acts of the president of a railway company in making drafts in the name of the company, which were honored by it, which was the case of *Olcott vs. Tioga R. Co.*, 27 N. Y. 546; 84 Am. Dec. 298, cited by counsel. But we think the books will be searched in vain for a case where it was ever held that authority to negotiate for the sale of property to one person at one time, on certain terms, the transfer to be made by the principal in person, was evidence of authority to sell and transfer the same property at some former time to another person on different terms. A new trial, would, however, have to be granted on the ground of error in the admission of evidence. The general statement of the witness McCurdy that Frank M. Horton did quite an extensive business at Spirit Lake trading in real estate, and frequently bought and sold in the name of Jennie L. Horton and Carolina W. Horton, without identifying the transactions, or describing them, or in any way bringing them home to the notice or knowledge of defendant, was inadmissible to prove agency. The court also erred in allowing the same witness to testify that F. M. Horton was publicly and generally known at Spirit Lake as the agent of Jennie L. Horton. Agency cannot be proved by general reputation.

Judgment reversed, and new trial ordered.

(115 MISSOURI 513, 22 S. W. REP. 492.)

JOHNSON vs. HURLEY.

(Supreme Court of Missouri, Division No. 1. May 8, 1893.)

Action by John M. Johnson and another against John M. Hurley to recover the possession of lands.

The answer set up an equitable defense, to the effect that defendant had purchased the land from the duly-authorized agent of the plaintiffs, had received from said agent deeds purporting to be duly executed and acknowledged by plaintiffs, and purporting to convey to him said lands; that he had paid to said agent the entire purchase price for the land, to wit, $1,650, its fair value, and had been put in possession under his said purchase; that he had, in good

faith, fenced said land, and erected thereon a dwelling house and other valuable and permanent buildings and improvements,—and prayed specific performance. The reply denied the new matter of the answer. The evidence showed that the deeds were forged by plaintiffs' agent, Finley A. Johnson, who received the money and absconded. The cause was tried as a suit in equity for specific performance of a contract for the conveyance of land, and a decree entered for defendant according to the prayer of the answer, and plaintiffs appealed.

Harrison and *Mahan,* for appellants.

Geo. W. Whitecotton and *Jas. P. Wood,* for respondent.

MACFARLANE, J. (After stating the facts):

1. The evidence leaves no doubt that plaintiffs' agent made the contracts with defendant for the sale of the land, assuming to act for them; that he received the purchase money, delivered a deed, to which their names were signed, and to which an acknowledgment certified in due form by the said agent as notary public was attached; and that under said transaction, and relying on it, defendant, in good faith, went into the possession and made valuable and lasting improvements. Under these circumstances, if said agent was authorized to make the sale, it would be the grossest injustice and fraud on defendant to deny him the benefit of the contract for the reason that it was not in writing, as required by the statute of frauds. To prevent such injustice courts of equity have uniformly held that such part performance relieves the contract of the infirmity created by the statute, and specific performance will not be denied. *Emmel vs. Hayes,* 102 Mo. 193; *Bowles vs. Wathan,* 54 Mo. 264.

2. The question then is whether Finley A. Johnson had authority from plaintiffs to make a sale of these lands. It may be stated, in the first place, as a general rule, that an agent can only act within the circumscribed authority given him by his principal, and one who deals with him is put upon his guard by the very fact that he is dealing with an agent, and he must ascertain for himself the nature and extent of his authority. The burden is, therefore, always cast upon one claiming the benefit of a contract made with another who assumes to act as the agent of a third person to establish by satisfactory evidence that the contract relied upon was within the scope of the agent's authority. Mechem, Ag. §§ 276–289, and cases cited.

3. The evidence, we think, fails to establish an express authority from the plaintiffs to the said Finley A. Johnson to conclude contracts for the sale of these Missouri lands, or to make the particular contract in question. Both of them, in testifying in the case, very emphatically deny such authority, and no evidence was introduced by defendant showing directly that any was given. The authority, then, if any existed, must be implied or presumed from the conduct of the parties. The general rule, which accords with the decisions in this State, is given by Mechem, in his work on Agency (section 84), as follows: "It may therefore be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority." *Rice vs. Groffmann*, 56 Mo. 434; *Summerville vs. Railroad Co.*, 62 Mo. 391. We are of the opinion that authority to make these sales is clearly implied from the conduct of the parties. One of the owners of the land, a preacher, lived in the state of Illinois; the other two, unmarried ladies, lived in the state of New Jersey. So far as appears, no one of them ever visited the land or gave any personal attention to it. From 1868 to 1883, it was in the hands of agents for sale. For most of this time the said Finley A. Johnson, a son of one of the owners, and a nephew of the other two, a lawyer, a notary public, and a judge of a court, who lived in the state of New Jersey, was one of the agents. The acknowledgment of deeds was made before him; he paid taxes; he delivered deeds to purchasers; he collected purchase money, and took notes and deeds of trust in his own name for deferred payments; he removed other local agents and made settlements with them,—he was, in fact, for years the medium through whom all the business was transacted. * * *

The manner in which this business was transacted through this

agent for 10 or more years was known in the community and to defendant. All inquiries in regard to the land were made of this agent; prices were given by him; purchase money paid to and deeds received from him; lands leased and rents collected by him,—and all under express authority. There was also evidence that a former agent, the one removed by Finley A., made sales and executed contracts upon which plaintiffs afterwards made deeds. That agent was removed for withholding money, and Finley A. was appointed, with express authority to collect purchase money. Why this agent, with all these express powers, should have been restricted only in the matter of making sales, is not explained by the evidence. We think the conduct of plaintiffs in the transaction of this business such as would reasonably have induced defendant to believe that the agent with whom he dealt had authority to make the sales, and after having acted upon that belief, paid the purchase price, and expended large sums in improvements, plaintiffs will not now be heard to dispute the authority.

We are well satisfied with the conclusions reached by the circuit judge, and affirm the judgment.

(120 NEW YORK, 274.)

CRANE vs. GRUENEWALD.

(New York Court of Appeals, April, 1890.)

Action for the foreclosure of a mortgage. Mrs. Crane, through an attorney named Baker, loaned defendant $8,000 on bond and mortgage, for five years, from December 2, 1875, with interest annually at seven per cent. The papers were left in Baker's possession, and he was authorized to collect the interest but not the principal. After the principal became due, Baker received from the defendant two payments of $1,000 each to apply on the principal, the bond and mortgage being each time produced by Baker. On a subsequent occasion $1,000 more was paid to Baker to apply on the principal, but the bond and mortgage were not produced, though Baker then had them in his possession and told the defendant so. Baker then sold the bond and mortgage, and forged an assignment of them to the purchaser. After that Baker received from defendant the balance due upon the mortgage. The trial

court held that defendant was entitled to credit for the first two payments of $1,000 each, but for no more, and rendered judgment of foreclosure and sale for the remaining $6,000 and interest.

Defendant appealed.

Gibson Putzel, for appellant.

Joseph F. Stier, for respondent.

PARKER, J. A mortgagor who makes a payment to one, other than the mortgagee, does so at his peril. If the payment be denied, upon him rests the burden of proving that it was paid to one clothed with authority to receive it. There is, however, one exception to this general rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been given for its receipt. (Paley on Agency, 3d ed., 275; Story on Agency, sec. 98; *Williams vs. Walker,* 2 Sandf. Ch. 325; *Smith vs. Kidd,* 68 N. Y. 130; 23 Am. Rep. 157; *Brewster vs. Carnes,* 103 Id. 556–564.)

So, if a mortgagee permits an attorney, who negotiates a loan, to retain in his possession the bond and mortgage after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had. This rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; and second, knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It would not avail him to prove that subsequent to a payment he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact, the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney that estops the owner from

denying the existence of authority in the attorney which such possession indicates.

Now, applying that rule to the facts found by the learned trial court in this case, the attorney Baker negotiated the loan of $8,000, which was made to this defendant on his bond secured by a mortgage on real estate. The mortgagor and mortgagee never saw each other. The securities were permitted to remain in the possession of the attorney. He had authority to collect the interest, but was not authorized to collect the principal or any part of it. After the principal became due he received from the mortgagor two payments of $1,000 each, on each occasion exhibiting the bond and mortgage to the mortgagor. Clearly as to these two items the attorney had apparent authority to receive the principal and the mortgagor could not deny to them the effect of payment *pro tanto* by proof that he did not have actual authority. Subsequently, and while the bond and mortgage still remained in the possession of the attorney, this defendant paid to him a further sum of $1,000, to be applied as a payment on account of the principal due. True, he did not at this time see the bond and mortgage, but it was actually in the possession of the attorney and the attorney so informed him. Here then was possession and information of the possession. It was information upon which he acted, and inasmuch as it was true, it constituted apparent authority. If it had turned out to be untrue it could not have availed the defendant. We see no ground for insisting that a party must actually see and examine the securities in order to entitle him to the protection of the doctrine of apparent authority; if he have trustworthy information of the fact which he believes and relies upon and it shall prove to be true, there seems to be no reason why it should not avail him as well as a personal examination of the securities. It follows, that the defendant should have been credited with the third payment of $1,000. The remaining $5,000, was paid to Baker after he had parted with the possession of the bond and mortgage and the question presented is, whether the defendant is entitled to be credited with the payments made by him while the attorney Baker did not have actual possession of the securities. It will be observed that Baker was not deprived of the possession by any act of Mrs. Crane. She believed that they were still in the custody of Baker. So far as she is concerned, therefore, or the plaintiff in this action who occupies no better or other attitude, she is not in position to deny such responsibility as her conduct imposes. She cannot say that by any act of hers she

is relieved from the operation of the estoppel which prevents her from denying that the first three payments of $1,000 each were effectual as such. If then the defendant is not entitled to be credited with the payments aggregating $5,000, it is because he is not in a situation to insist upon the estoppel. We are of the opinion that a proper application of this doctrine of apparent authority, requires us to hold that the defendant's failure to take the precaution of ascertaining whether the attorney was actually in the possession of the securities when he paid the several sums aggregating $5,000, deprives him of the right to assert that he was induced to make the payments because it appeared to him that the attorney had the right to receive the money. For, as we have already observed, it cannot appear to the mortgagor that an attorney has authority to receive the principal, save where he has present possession of the securities.

Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. This knowledge he did not have, for it was not the fact.

By his own wrongful act, the attorney had parted with possession, and as a necessary consequence had deprived himself of the power to longer misrepresent his authority in respect thereto to the detriment of the mortgagee. The mortgagor thereafter placed his trust solely in the assertions of the attorney and was deceived. In so doing he was legally as much at fault as the mortgagee, who also relied upon the attorney's trustworthiness. Therefore, he cannot invoke in support of his contention the doctrine of apparent authority. A rule which undoubtedly had its foundation in the equitable principle, that if one of two innocent persons must suffer, he ought to suffer in preference whose conduct has misled the confidence of the other into an unwary act. (Sic.)

The judgment should be reversed and a new trial granted with costs to the appellant; unless within thirty days the plaintiff stipulates to modify the judgment by deducting therefrom, $104.50, that being the amount of costs of General Term, and the further sum of $1,000, with interest thereon from July 1, 1882, to date of entry of the judgment together with any other sum paid by Gruenewald to Baker whether for principal or interest prior to July 20,

1883, for which he was not credited by the trial court; in which event the judgment as modified is affirmed with costs of this court to appellant.

(50 MAINE 378.)

HEATH vs. NUTTER.

(Supreme Judicial Court of Maine, 1862.

Action to recover lands. Both parties claimed under one Robbins, the plaintiff under a quitclaim deed direct from him and defendants under a deed from him by Samuel G. Rich, his attorney. The power of attorney held by Rich authorized him to demand and receive all sums of money due him from certain persons "and to settle and compromise all matters in dispute in the premises," and "to grant any and all discharges by deed or otherwise, both personal and real," etc.

Defendants also offered to prove by Rich that the power of attorney was given to him for the purpose of conveying the real estate; that Robbins had received part of the consideration; that at the time Robbins executed the quit claim deed to plaintiff, he said he did not consider that he had any interest in the premises because he had given Rich a power of attorney to convey them; and that Robbins had ratified the conveyance by Rich both verbally and by letter and by receiving part of the consideration.

This evidence the court rejected and plaintiff recovered. Defendant appealed.

Hathaway & Drinkwater, for plaintiff.
Wiswell, for defendants.

APPLETON, C. J. The power of attorney to Rich did not empower him to convey the demanded premises. * * * The authority "to grant any and all *discharges* by deed or otherwise, both personal and real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by bill of sale, or by deed of warranty, all the personal and real estate of his principal. Nor can the authority to convey by deed be found elsewhere.

Whenever an act of agency is required to be done in the name

of the principal under seal, the authority to do the act must be conferred by an instrument under seal. A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the land, *Gage vs. Gage*, 10 N. H. 424. Story on Agency, §§ 49, 50; *Montgomery vs. Dorion*, 6 N. H. 250. So the ratification of an unauthorized conveyance by deed must be by an instrument under seal. Story on Agency, § 252. A parol ratification is not sufficient. *Stetson vs. Patten*, 2 Greenl. (Me.) 359, 11 Am. Dec. 111; *Paine vs. Tucker*, 21 Me. 138, 38 Am. Dec. 255; *Hanford vs. McNair*, 9 Wend. (N. Y.) 54; *Despatch Line vs. Bellamy Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203.

The plaintiff received his conveyance with a full knowledge of the equitable rights of the tenants. The remedial processes of a court of equity may perhaps afford protection to the defendants. At common law their defense fails.

(34 NEW JERSEY LAW, 116.)

LONG vs. HARTWELL.

(New Jersey Supreme Court, February, 1870.)

John H. Platt, as agent for Nathaniel O. Carpenter, on the 15th of March, 1866, executed an agreement in writing, under seal, with Patrick Long, by which Carpenter agreed to convey two lots of land, on terms therein stated. Carpenter conveyed one lot and the action was brought against his administrator to recover damages for not conveying the other. Platt's authority to make the contract was by parol.

J. Dixon, Jr., for plaintiff.

J. Harvey Lyon, for defendant.

VAN SYCKEL, J. * * * The authority to the agent to execute the written agreement having been by parol, it is insisted that it does not bind the principal. Our statute of frauds does not require the agent's authority to make a contract to convey land to be in writing; it exacts a written contract, not a written power to the agent. The distinction is clearly drawn in the terms of the statute, between conveying and contracts to convey land. In the former case,

under the tenth section the power to the agent must be in writing; while in the latter, under the fourteenth section, the words "in writing" are omitted, and the cases, both in England and this country, agree that the appointment may be by parol. 2 Kent's Com. 613; 10 Paige (N. Y.) 386; Story on Agency § 50; Brown on Frauds, § 370, note 2. The fact that the contract in this case was sealed by the agent does not vitiate it. There is no doubt about the general rule that a power to execute an instrument under seal must be conferred by an instrument of equal solemnity. If the writing given by the agent be under seal and that be essential to its validity, the authority of the agent must be of equal dignity or it cannot operate. Here a seal was not vital to the contract; there was no authority to the agent to attach a seal, therefore the seal is of no value, but the power to execute the contract without seal having been ample, so far it becomes the act of the principal, and inures as a simple contract. 2 Kent's Com. 613; *Lawrence vs. Taylor*, 5 Hill (N. Y.) 107. * * *

NOTE.—That unnecessary seal may be disregarded, see also: *Wagoner vs. Watts*, 44 N. J. L. 126; *Morrow vs. Higgins*, 29 Ala. 448; *Thomas vs. Joslin*, 30 Minn. 388; *Adams vs. Power*, 52 Miss. 828; *Worrall vs. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Dutton vs. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765. See, also, *post*, ⟵.

(107 NEW YORK, 490.)

BICKFORD vs. MENIER.

(New York Court of Appeals, December, 1887.)

S. P. Nash, for appellant.

J. B. Pannes, for respondent.

RUGER, Ch. J. This action was brought by the plaintiff to recover of the defendants the sum of £1,200, alleged to have been loaned to them by her in the following sums at the times mentioned, viz., £200 in November, 1878; £200 in March, 1879, and £800 in May, 1879. Previous to these loans the plaintiff does not appear to have had any personal or written communication with the defendants in respect thereto, but alleges that she loaned the money to one Edward Bickford, an alleged agent of the defendants.

The loans were made at the city of New York, of which place the plaintiff and Edward Bickford, who were brother and sister, were both residents, and the defendants resided at Paris, in France. It is not claimed that Edward Bickford had any written power of attorney to borrow money for the defendants, or any positive

unwritten or verbal authority to do so, but it is argued that the plaintiff had the right to imply such authority, from the power which Edward Bickford appeared to exercise as the agent of the defendant. The power which such agent really possessed and the scope of his agency is left, by the case, altogether to be inferred from the course of business pursued by the agent, and the verbal agreement between the parties under which he entered into the employment of the defendants. That he was an agent for certain purposes is not disputed, but it is strenuously contended by the defendants that he had no power to borrow money.

The evidence as to the terms of the contract of employment and as to the methods of transacting the business carried on under it, is quite vague and inconclusive, and we have been unable to discover therefrom any facts from which an intention, on the part of the defendants, to vest the agent with authority to borrow money in their names, for the purpose of the business in which he was employed, can reasonably be derived. It was said by Judge COMSTOCK in *Mechanics' Bank vs. New York & New Haven Railroad Company*, 13 N. Y. 632, "that underlying the whole subject there is this fundamental proposition that a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it, and beyond the terms of the instrument or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. I know of no other mode in which a controverted power may be established." This doctrine was somewhat extended in the case of the *New York & New Haven Railroad Company vs. Schuyler*, 34 N. Y. 30, where it was held, "that when the authority of an agent depends upon some fact outside the terms of his power and which from its nature, rests particularly within his knowlege, the principal is bound by the representations of the agent, although false, as to the existence of such fact."

Such extension of the rule, however, has no application to this case, as the facts proved, do not bring it within the principle stated. It would seem to be the general rule that no acts of an agent can be resorted to, to establish a power, not included within the terms of his commission, except those which are brought to the knowledge of his principals and are approved or acquiesced in by them.

It was said by Judge ANDREWS, in *Welsh vs. Hartford Insurance*

Co., 73 N. Y. 10, that "the authority of an agent is not only that conferred upon him by his commission, but also as to third persons, that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third persons who, believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal." A reference to the undisputed evidence in the case, will show the nature of the agency intended to be created by the defendants, and the extent of the power which may fairly be implied therefrom. The rule that a principal is bound not only by the acts of his agent, which are expressly authorized by his commission, but also for the exercise of all powers which are necessary and essential to the execution and performance of the express purposes described in his commission, is assented to by the courts below and by both parties to the action. In view of this rule, let us look at the case for the purpose of discovering the real authority conferred.

The defendants were chocolate manufacturers, carrying on their business and residing in the city of Paris, France. They also had a branch factory and agency in the city of London, under the charge and management of the Emile Guenin. In and subsequent to 1868 Edward Bickford was a clerk in their employ in London, and in 1872, for certain reasons, deeming it desirable to establish an agency for the sale of their goods in New York, they made overtures to him, to proceed there and receive consignments and make sales of their manufactures upon a salary. In relation to the original employment, Mr. Bickford testified as follows: "I came from London to New York to establish the house of Chocolate Menier for these defendants; at first I opened an office at 45 Beaver street; cleared the goods from the ship, and commenced selling their goods, and from that time forward, up to 1882, I continued in business in New York for them; during that time I made my returns and received goods from the London house; * * * when I came from London to New York to open this chocolate establishment, I brought no power of attorney with me; I had several cases of goods, chocolate, and I opened in the name of Edward Bickford and the business was carried on in that name; I sold chocolate and other manufactured goods on a salary. * * * I opened books of account and made returns from time to time; rendered accounts to Mr. Guenin, of London; * * * from that

time down to 1879, I kept regular books of account, and a bank account in James G. King's Sons, also in the Bank of the Metropolis, in the Merchants' and Manufacturers', the Irving, and the New York National Exchange Bank; those accounts were all kept in the name of Edward Bickford." These extracts from Bickford's evidence embrace all of the facts proved by the plaintiff relating to the character of the original employment, and the nature of the agency intended to be conferred upon Bickford. It will be seen therefrom, that the sole authority actually conferred was the right to receive the property of the defendants, to store and sell it.

An implied power may be derived, from the express powers mentioned, to apply each part of the proceeds of sale as was necessary to pay his salary and legitimate expenses required in carrying on the business. It follows as a necessary consequence that it was his duty to remit the balance to his principals. There is certainly nothing in the performance of these duties which rendered it necessary that Bickford should borrow money on the credit of his principals. It is idle to argue that an authority to borrow money may be implied from a naked power to receive and sell property and remit proceeds. The duties of an agent in such a case are analogous to those of a factor, and it is well settled that such an agent has no authority to borrow money in the name of his principal. 1 Parsons on Contracts, 42, note e; 1 Chitty on Contracts, (11 Am. ed.) 293; *Rossiter vs. Rossiter,* 8 Wend. 494; 24 Am. Dec. 62; *Hawtayne vs. Bourne,* 7 M. & W. 595. If we examine the evidence relating to the course of the business actually carried on under this employment, we shall fail to find any exercise of a power to bind his principals for borrowed money, or any similar power which would authorize the implication that he possessed such a power. No evidence appears authorizing the inference that the defendants held Bickford out to the American public as an agent of theirs for any purpose. The business was all carried on in the individual name of Edward Bickford, and it does not appear that the names of the defendants were in any way used in the business. There was evidence that Bickford was in some way introduced by the defendants to the banking firm of John G. King & Sons, but nothing was shown authorizing the inference that he was thereby empowered to borrow money generally of them in the name of his principals. It is quite significant that in a course of correspondence extending over a period of ten years between the agent and

his principals, no allusion is made to the existence of any such power, and neither is there any apparent ratification by the principals of the exercise of such power on the part of the agent.

From a settlement of the accounts of the parties made as of the date of May 1, 1879, it appeared that the New York agency had run behind and become indebted to the defendants over and above the property remaining on hand at the agency in the sum of £1,613, 18s. This sum represented the accumulated deficiencies of Bickford for a long period of time, and was chargeable to him as so much cash, which he was liable to account for to the defendants on demand. In other words, he had, up to that time, appropriated to his own use the moneys of the defendants and failed to liquidate his obligations to them. He was enabled to square his accounts at this time by the generosity of his principals in voluntarily writing off therefrom the sum of £1,574, 18s, 3d. Bickford then, according to his own statement, started to continue the business discharged from any pecuniary liability to the defendants. Although £400 of the sum recovered in this action had been previously borrowed by Bickford, no part of it entered into the statement of May 1, 1879, and no report of such borrowing had been made by Bickford to his principals at that time. It is obvious if this sum had entered into that statement, as it should have done if it was then in truth a liability of the defendants, Bickford's deficit had been untruly represented to the defendants, and it ought to have been increased nearly $2,000. It is an incontrovertible inference from the evidence that from a time anterior to these alleged loans down to a time subsequent thereto, Bickford was largely indebted to the defendants and liable immediately to be called upon for the payment of such indebtedness.

A series of ten drafts dated on different days and running from October 5, 1878, to January 19, 1879, drawn by Guenin upon Bickford for small sums aggregating about £200, appear in evidence, and were apparently drawn to recover from Bickford some part of his indebtedness to his principals. Although no other drafts appear in the case, it is fairly inferable from the evidence that such drafts were generally used, and that the mode of remitting the proceeds of the goods sold by Bickford, to which defendants were entitled, was by the payment of the drafts drawn upon him by the defendants.

To infer that it was within the apparent scope of Bickford's

agency to borrow money in the name of his principals to pay his own debt to them, involves a manifest absurdity. The subject of borrowing was, on one or two occasions, referred to in the correspondence between Bickford and Guenin, but a careful examination shows that it invariably referred to a borrowing by Bickford of a particular firm to discharge his obligation to defendants, and no inference can be drawn therefrom that Guenin contemplated a loan upon the credit of the Meniers. It is not claimed that the plaintiff knew of these letters or transactions under them, or was thereby induced to loan the money in question, and she apparently relied altogether upon the actual authority possessed by Bickford. It is also quite clear that the references in the letters related to specific transactions, when, if anything, a special authority alone was conferred, and afford no basis for an inference that any general authority was possessed by, or intended to be given to the agent to use the credit of his principals.

Bickford testified that in the course of his agency he probably borrowed and remitted to his principals from $15,000 to $20,000, but there is no evidence in the case showing that he borrowed this money upon the credit of the Meniers, or that he did so at all until after special authority was given therefor, or that he did it for any other purpose except to discharge his obligations to his principals. If we come to the particular transaction in question we find no evidence of any loan by the plaintiff to the Meniers, or upon their credit. No representation was made by the agent that he had authority to borrow for the Meniers, and no note or memorandum was given by him to the plaintiff at the time of the loan. The drafts through which the loans were made were drawn by the plaintiff, and made payable to Edward Bickford individually.

All proof of the transaction was confined to the oral evidence of Miss Bickford and her brother given on the trial. Their evidence does not materially vary as to the circumstances of the loan and is most concisely stated in the testimony of the plaintiff. She says: "When I came over from England in November, I loaned £200 to him for the business of Menier; I loaned the next £200 in March the next year; my brother was going to England to see Mr. Guenin, and he required the money for the drafts, and I was to be left in charge of the business, and I could not be left without money to pay the drafts; I loaned it for that purpose entirely; the £800 was loaned when he returned from England; he returned the end of

April some time, and in May it was advanced; it was loaned for the same purposes as the other money was loaned."

This evidence does not show that Bickford claimed to the plaintiff to have authority to borrow money in the name of the Meniers, or that he in fact, did borrow it upon their credit, or to discharge their obligation. It is probably true, in a general sense, that he wanted it for the business of Menier, but that was a business which he was carrying on in his own name and had incurred an indebtedness to them in performing. It was this indebtedness that the drafts were drawn to recover, and the plaintiff seems to have been cognizant of this fact. It is difficult to see how she could have supposed that she was lending money to the Meniers, when she was obviously supplying money to pay the obligations of her brother to them.

The plaintiff has been allowed to recover in the action, upon the theory that the borrowing in question was within the apparent scope of the agent's authority, and this question was left, as one of fact, to be determined by the jury. We are of the opinion that the court erred in this respect, and that there was no evidence in the case authorizing a verdict for the plaintiff. The apparent authority in this case was precisely co-extensive with the actual authority. The agent's real authority was confined to the duty of receiving consignments from the Meniers, storing and caring for them, selling them, and, after paying the expenses of the business from the receipts, to remit the balance to the Meniers.

If the transaction of this business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment, but it does not afford a sufficient ground for the inference of such a power, to say that the act proposed was convenient or advantageous, or more effectual in the transaction of the business provided for; but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment. We are of the opinion that the case of *Tucker vs. Woolsey*, 64 Barb. (N. Y.) 142, is in point. The facts of that case are the counterpart of those existing here. There the agent was furnished with goods to sell in New York for a principal in France. He there hired a place to store and show his goods. He also received special authority on several occasions to borrow money, as perhaps Bickford did here, but it was there

held that the general power to borrow money was neither within the actual authority of the agent or its apparent scope.

We think the motion to non-suit the plaintiff at the close of her evidence should have been granted, and that it was error to deny it.

The judgment of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

All concur. Judgment reversed.

NOTE.—See also *Heath vs. Paul*, (1892) 81 Wis. 532.

(5 CUSHING, 483; 52 AM. DEC. 741.)

GARDNER vs. GARDNER.

(Supreme Judicial Court of Massachusetts, March, 1850.)

Action to foreclose a mortgage. It appeared that the name of Polly Gwinn, the mortgagor, was written by her consent, in her presence, by her daughter.

O. Bunker, for demandant.

T. G. Coffin, for the tenant.

SHAW, C. J. The only question is upon the sufficiency of the execution of a mortgage deed, as a good and valid deed of Polly Gwinn. The execution of the deed is objected to, on the ground that when a deed is executed by an agent or attorney, the authority to do so must be an authority of as high a nature, derived from an instrument under the seal of the grantor. This is a good rule of law, but it does not apply to the present case. The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed by attorney, the disposing power, though delegated, is with the attorney, and the deed takes effect from his acts, and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proved by evidence of as high a nature as the deed itself.

To hold otherwise, would be to decide, that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing the letter of attorney under seal.

It appears to us, that the distinction between writing one's name in his presence and at his request, and executing a deed by attorney, is obvious, well founded, stands on satisfactory reasons, and is well sustained by authorities; *Ball vs. Dunsterville*, 4 T. R. 313; *The King vs. Longnor*, 1 Nev. and M. 576, s. c. 4 Barn. and Adol. 647; 2 Greenl. Ev. sec. 295. We think the deed was well executed by Polly Gwinn; and the judgment must therefore stand for the demandant.

NOTE.—See also *Wood vs. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Handyside vs. Cameron*, 21 Ill. 588, 74 Am. Dec. 119; *Croy vs. Busenbark*, 72 Ind. 48; *Eggleston vs. Wagner*, 46 Mich. 610; *McMurtry vs. Brown*, 6 Neb. 368.

(140 MASSACHUSETTS, 36, 54 AM. REP. 442.)

PHELPS vs. SULLIVAN.

(Supreme Judicial Court of Massachusetts, June, 1885.)

Action to foreclose a mortgage. The opinion states the facts.

G. H. Stevens, for demandant.

S. Bancroft, for tenant.

MORTON, C. J. This is a writ of entry to foreclose a mortgage. The demandant claims under a mortgage from the tenant to Nathan P. Pratt, and an assignment thereof by said Pratt. It appeared at the trial that said Pratt executed and acknowledged the assignment in blank, and orally authorized his son, when he could find a person to purchase the mortgage, to write in the name of such person as the grantee, and to deliver the assignment. The son negotiated the mortgage to one Simonds, filled in his name as grantee, and then delivered to him the assignment. He afterwards reported what he had done to Nathan P. Pratt, who replied, "It is all right." The only question presented by the bill of exceptions

is whether, upon these facts, there was a valid assignment to Simonds.

The tenant contends that the assignment was invalid, relying upon the rule of the common law that an authority to an agent to execute a deed or other specialty must be under seal. But we do not think the case is governed by this rule. Where a deed purports to be executed by an agent, or where the person with whom an agent is dealing knows that he is acting as agent, it may be that such person must see to it at his own peril that the agent has legal authority. But in this case the assignment did not disclose, and Simonds did not know, that the son was acting as agent in any respect except to deliver the assignment. It is settled that an authority to deliver a deed or other specialty may be by parol. *Parker vs. Hill,* 8 Metc. (Mass.) 447. A deed takes effect from its delivery, and it may well be held that the authority to deliver, which may be oral, is an authority to deliver the deed in the condition in which it is when delivered, if there are no circumstances of suspicion to put the grantee upon inquiry. When a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized, and delivers it to an innocent grantee without knowledge, we think the grantor is estopped to deny that the deed as delivered was his deed. Otherwise he may, by his voluntary act, enable his agent to commit a fraud upon an innocent party. Whether if the agent violates the instructions in filling the blanks, the grantor would not in like manner be bound, we do not discuss, as it is not involved in this case. To hold that such deeds are invalid, because the authority to fill the blanks is not under seal, would tend to unsettle titles, and would be mischievous in its results. Few deeds are written by the grantors. Most are written by scriveners, and a grantee to whom a deed is delivered has no means of determining whether the body of the deed was written before or after the signature was affixed. It would be very dangerous to allow titles to be defeated by parol proof, that a deed, without suspicion on its face, duly signed and sealed by the grantor, which he authorized to be delivered, was in fact written in some part after he had executed it, by an agent having only oral authority. We think a person taking such a deed in good faith has a right to rely upon it, and that the grantor cannot be permitted to aver that it is not his deed. *White vs. Duggan,* 140 Mass. 18, 54 Am. Rep. 441. * * * (Dis-

tinguishing *Burns vs. Lynde*, 6 Allen, (Mass.) 305, and *Basford vs. Pearson*, 9 Allen, 387, 85 Am. Dec. 764.) Upon the facts presented in the bill of exceptions, we are of opinion that the assignment to Simonds was valid. * * *

Exceptions sustained.

NOTE.—See *post, Drury vs. Foster*, p.—— See also in accord with the principal case: *VanEtta vs. Evenson*, 28 Wis. 33, 9 Am. Rep. 486; *Schintz vs. McManamy*, 33 Wis. 299; *Field vs. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Swartz vs. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Campbell vs. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Vose vs. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Garland vs. Wells*, 15 Neb. 298.

CONTRA.—*Upton vs. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Preston vs. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153; *Williams vs. Crutcher*, 5 How. (Miss.) 71, 35 Am. Dec. 422; *Davenport vs. Sleight*, 2 Dev. and Bat. L. (N. C.) 381, 31 Am. Dec. 420; *Bland vs. O'Hagan*, 64 N. C. 472.

(84 MAINE 349, 30 AM. ST. REP. 353.)

BRECKENRIDGE vs. LEWIS.

(Supreme Judicial Court of Maine, March 23, 1892.)

Assumpsit by Joseph Breckenridge against Mary, A. H. Lewis. There was a verdict for plaintiff, and defendant moves to set the same aside, and excepts.

F. V. Chase, for plaintiff.

Edward Avery and *A. A. Strout*, for defendant.

HASKELL, J. The plaintiff indorsed the defendant's promissory note for the accommodation of one Morse, the payee, who then negotiated the same, and, when it fell due, the plaintiff paid it, and now sues to recover the amount of the note from the defendant.

1. The signature of defendant to the note was claimed to be a forgery. The court ruled that a defense.

2. The note was claimed to have been fraudulently written by the payee, Morse, over the defendant's name, signed on blank paper, to enable Morse to write an order on a savings bank, where defendant had funds, as the necessities of her business entrusted to Morse might require; and the court ruled that contention no defense.

It is contended that defendant's negligence in the premises

should have been submitted to the jury; but that was not necessary, inasmuch as the question of negligence, as matter of fact, need not be considered an element required to charge the defendant under the facts of this case. The payee of the note, Morse, was intrusted with defendant's name in blank, to draw funds necessary to meet the calls of her business, intrusted to the care of her agent, Morse. He was authorized to write an order above defendant's signature, but instead of so doing he wrote a promissory note, and obtained the amount of it from a stranger. He fraudulently used his apparent authority for his own gain instead of his principal's. His relation to his principal is the same as if he had procured the money on an order that he was authorized to write, and then embezzled it. The defendant may be held under the plain rules of agency. By intrusting her signature to her agent for use, the defendant gave him an apparent authority to use it in the manner he did. The limited authority, only known to themselves, cannot be held to reach strangers, who neither knew, nor had means of knowing, of that secret limitation. The note, when presented for discount, gave no suggestion of infirmity. The signature was genuine, and apparently the payee, defendant's agent, who indorsed it, had authority to negotiate it. It was apparently the defendant's genuine promise, and she, by intrusting her name to her agent for commercial purposes, held him out as an agent with general powers in relation to it. She clothed him with apparent authority, and cannot now deny it to the loss of any person who innocently relied upon it. It is better that she bear the consequences of misplaced confidence than that an equally innocent person shall suffer. She selected the agent; the plaintiff did not. The apparent authority of the agent makes his act her own, in this case, as effectually as if her authority had been real. That is the doctrine of *Young vs. Grote*, 4 Bing. 253, and of *Putnam vs. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206, cited with approval in *Wade vs. Withington*, 1 Allen, 562, and in *Greenfield Bank vs. Stowell*, 123 Mass. 198, 199, 25 Am. Rep. 67, where all the cases, both English and American, are reviewed. See, also, *Redlon vs. Churchill*, 73 Me. 146, 40 Am. Rep. 345.

The same doctrine is held in the Earl of Sheffield's Case, L. R. 13 App. Cas. 333, (1888.) The earl authorized his agent to procure a loan for a limited amount, and transferred to him in blank certain stocks, and delivered to him certain bonds for the purpose. The agent procured the loan, and delivered the securities to a broker,

who in turn pledged them for his entire indebtedness to certain banks. The earl sought to redeem, but the banks (the broker being insolvent) refused him, relying upon their legal title to the securities. At the first trial redemption was denied upon the ground that the agent was master of the stocks, and had actual authority to convey them. On appeal it was held that the agent had not actual authority to dispose of the stocks as he pleased; that his actual authority was limited to the amount of the loan authorized; but that the banks became owners of the stocks and bonds, having acquired the legal title, without notice of infirmity, through an agent who apparently had full authority to give it. On final appeal, the lords approved the doctrine of the court of appeals, that if the banks as purchasers of the stocks took the legal title from an agent having apparent authority to give it, without notice of his actual limited authority, such title would become absolute; but reversed the judgment of the court of appeals, for the reason that the banks had actual notice of the limited authority of the broker over the stocks, and allowed the earl to redeem. See, also, *Colonial Bank vs. Cady*, L. R. 15 App. Cas. 267.

Is is the same doctrine held where the signature is placed to a blank instrument to be filled by the person intrusted with it, only the blank is a patent limitation of the agent's authority. He may fill the blank as may suit him best, and the principal will be held. The blank form carries with it an implied authority to complete it, but not to alter it. *Russell vs. Langstaffe*, 2 Doug. 514; *Violett vs. Patton*, 5 Cranch, 142; *Bank vs. Neal*, 22 How. 96; *Bank vs. Kimball*, 10 Cush. 373; *Angle vs. Insurance Co.*, 92 U. S. 330; *Abbott vs. Rose*, 62 Me. 194, 16 Am. Rep. 427, approved in *Kellogg vs. Curtis*, 65 Me. 61. * * *

Motion and exceptions overruled.

III.

EVIDENCE OF THE AUTHORITY.

(11 MICHIGAN, 185.)

HATCH vs. SQUIRES.

(Supreme Court of Michigan, January, 1863.)

Squires replevied property which one Hatch had taken possession of as the agent of McCormick. On the trial considerable evidence was given by plaintiff of the acts, declarations and promises of one Walker whom plaintiff alleged to be the agent of McCormick. Defendant objected to this evidence upon the ground that there was no evidence that Walker was such agent. Judgment for plaintiff and defendant brought error.

H. J. Beakes, for plaintiff in error.

O. Hawkins, for defendant in error.

MARTIN, C. J. This case hinges almost entirely upon the admissibility of the acts and declarations of Walker—who purported to act as the agent of McCormick—without proof of such agency. The authority of an agent must be positively shown, either by proving his authority to act, or by proving his acts with the knowledge and recognition of his principal. In this case nothing of the kind was accomplished or attempted. The only attempt to prove the agency of Walker was by proving his own acts and assertions. This is insufficient. As these would not bind McCormick, so they would not bind the plaintiff in this cause. It is too obvious to need demonstration that an agent's authority cannot be proved by his own assertion alone. There must be some evidence of authority beyond his assertion, or of ratification of his acts before any party can be bound by such acts.

There was error, therefore, in admitting evidence of the acts, declarations and promises of Walker; and the judgment must be reversed, with costs, and a new trial granted.

NOTE—In *Mitchum vs. Dunlap*, 98 Mo. 418, it is said: "The law is well settled that the declarations of one who assumes to act as the agent of another are not admissible to establish the agency. *Peck vs. Ritchey*, 66 Mo. 114; Whart. on Ev. (2d ed.) § 1183; *Sumner vs. Sanders*, 51 Mo. 89.

But the authority of the agent need not be proved by an express contract of agency; it may be proved by the habit and course of business of the principal. *Franklin vs. Ins. Co.*, 52 Mo. 461; *Brooks vs. Jameson*, 55 Mo. 512. So, too, the agency and extent of authority may be inferred from circumstances. *Hull vs. Jones*, 69 Mo. 587."

Before the statements or admissions of the agent can be proved, the fact of the agency must first be shown by other evidence. *Peck vs. Ritchey, supra; Gilbert vs. James*, 86 N. C. 244; *South, etc., R. R. vs. Henlein*, 52 Ala. 606.

Agency can not be proved by general reputation. *Graves vs. Horton, ante*, p. 82.

Where the authority is conferred by written instrument, the writing is the best evidence. *Neal vs. Patten*, 40 Ga. 363; *Columbia Bridge Co. vs. Geisse*, 33 N. J. L. 39; *Reese vs. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

(15 KANSAS, 492.)

THE HOWE MACHINE CO. vs. CLARK.

(Supreme Court of Kansas, July, 1875.)

Replevin by the company against Clark. The plaintiff originally owned the property in question which it had leased to one Tracy, Tracy sold it to defendant, without plaintiff's knowledge or consent. The authority of Tracy became the material matter in controversy. Defendant had judgment and plaintiff brings error.

Devenney & Green, for plaintiff.

St. John & Parker, for defendant.

VALENTINE, J. * * * It was error for the court to permit defendant to prove the statements of Tracy formerly made by him concerning this and other property. The defendant claimed that Tracy had authority from the Howe Machine Company to sell this identical property; and for the purpose of proving that Tracy had such authority, introduced evidence over the objections of the plaintiff, but with the permission of the court, showing that Tracy had at different times stated that he had such authority, and that he had authority to sell not only this but other property belonging to the company. Now it is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claimes to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to

prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who it is claimed had attained such authority. * * *

Judgment reversed.

NOTE.—See also *Thayer vs. Mecker*, 86 Ill. 470; *French vs. Wade*, 35 Kan. 391; *Piercy vs. Hendrick*, 2 W. Va. 458, 98 Am. Dec. 774: *Gould vs. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50; *Dowell vs. Williams*, 33 Kan. 319.

CHAPTER V.

OF RATIFICATION.

I.

WHAT IS MEANT BY RATIFICATION.

(16 California, 591.)

McCRACKEN vs. CITY OF SAN FRANCISCO.

(Supreme Court of California, October, 1860.)

Field, C. J. * * * To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. It follows, as a consequence, that where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such acts can only be by ordinance. * * * It follows, also, from the general doctrine, that a ratification is equivalent to a previous authority, that a ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction, unless in a position to enter directly upon a similar transaction himself. Thus, if an individual, pretending to be the agent of another, should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself, and impart

validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone. So, also, contracts made upon an assumed agency for a single woman cannot be ratified by her after marriage, without the consent of her husband, for her power to contract alone ceases with her marriage. * * *

NOTE.—"An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent; but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done so prospectively in the first instance. The power to ratify *ex vi termini* implies a power to have made the contract, and the power to ratify in a particular manner implies the power to have made the contract in that manner." *Brady vs. Mayor, etc., of New York*, 16 How. Pr. (N. Y.), 432, quoted with approval in *Zottman vs. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96. So, in *Calhoun vs. Millard* (1890), 121 N. Y. 69, 81, involving the question of the ratification of municipal bonds, it is said: "Municipal corporations, since they possess no general authority to issue such bonds, cannot, by recognition or subsequent ratification, validate obligations which they had no power to create."

II.

WHAT ACTS MAY BE RATIFIED.

(4 ALLEN, 447.)

GREENFIELD BANK vs. CRAFTS.

(Supreme Judicial Court of Massachusetts, September, 1862.)

This was an action upon a note bearing the name of Thomas Crafts as joint maker with Martin Crafts, and three drafts drawn by Martin Crafts and bearing the name of Thomas Crafts as indorser. There was evidence tending to show that the signatures of Thomas Crafts were forgeries. Plaintiffs, however, claimed that they were written with his express or implied authority; that the act had been ratified by him; and, that he had so conducted as to lead plaintiffs to believe the signatures were genuine and was hence estopped to assert the contrary. Other facts appear in the opinion. The verdict was for the plaintiff upon the note and two of the drafts. Both parties alleged exceptions.

J. Wells, for defendants.

C. Allen, for plaintiffs.

DEWEY, J. It is apparent from the finding of the jury, that the plaintiffs failed to prove that the signature of Thomas Crafts' name was placed upon these various instruments with his previous authority. The right of the plaintiffs to maintain their verdict rests upon proof of ratification and adoption by Thomas Crafts of the act of signing, or upon the ground of an estoppel to deny the signature thereto, by reason of his acts in reference to the same, when brought to his knowledge.

As to the question of estoppel, and what was necessary to be shown to prove such estoppel, the court adopted the instructions asked for by the defendants, and no objection under that head can now be made the subject of inquiry, unless it be that of the refusal of the court to adopt the ruling asked for as to the sufficiency of all the evidence to warrant a verdict for the plaintiffs, which may be the subject of a distinct consideration.

This leaves us, as the first and most important question, that which arises upon the rulings asked for by the defendants upon the matter of adoption and ratification by Thomas Crafts of the use of his name on these instruments. The case was put to the jury under instructions that the plaintiffs might maintain their action, if they established the fact of an adoption and ratification of the signatures by Thomas Crafts, the judge at the same time giving to the jury full and proper instructions as to what was necessary to be shown to establish such adoption and ratification in the ordinary cases of a signature of a note without a previous authority.

But it is now urged on the part of the defendants, that these signatures were incapable of such adoption or ratification.

As to this objection, it is clear that it cannot be maintained upon the ground of the form of the signatures merely. This form of signature, though not the more usual manner of signing by an agent, does not prevent the person whose name is placed on the note from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted. Various similar cases will be found, where the party has been charged, where the name of the principal appears upon the note accompanied with no indication of the fact of its having been signed by another hand. It was so in *Watkins vs. Vince*, 2 Stark. R. 368; in *Merrifield vs. Parritt*, 11 Cush. (Mass.) 591, and *Brigham vs. Peters*, 1 Gray,

(Mass.) 147. Wherever such signature by the hand of another was duly authorized, and also where a note was thus executed under an honest belief by the party signing the name that he was thus authorized we apprehend that there can be no doubt that it would be competent, in the case first stated, to maintain an action upon the same, upon proof of the previous authority thus to sign the name, or, in the latter, upon proving that the signature, although at the time unauthorized, was subsequently adopted and ratified by the party whose name appears as promisor. Nor is it necessary to establish a ratification, that there has been any previous agency created. An act wholly unauthorized may be made valid by a subsequent ratification. This may be so, although the actor was an entire stranger as to any business relations. *Culver vs. Ashley*, 19 Pick. (Mass.) 301.

The only question upon this part of the case is, whether a signature, made by an unauthorized person under such circumstances as show that the party placing the name on the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full, and intentionally made and designed to signify an adoption of the signature. The defendants insist that it cannot, by such evidence as would in other cases warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction, as to the effects of ratifying an unauthorized act, in the two supposed cases.

In the first case, the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified, where there was no pretence of agency. In the other case, the individual who presents the note thus signed passes the same as a note signed by the promisor, either by his own proper hand, or written by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner the note was signed, and

the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority.

It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense.

In the case of *Forsyth vs. Day*, 46 Maine, 176, it was held that there might be a ratification and adoption of a forged note, by the person whose name appears as promisor.

We perceive no valid objections to the ruling of the court, and instructions given to the jury on this point.

The further inquiry is, whether the court properly declined to adopt the prayer of the defendants, that the court should rule and instruct the jury that all the facts proved and relied upon by the plaintiffs were not sufficient to amount to an estoppel, or to show such an adoption of the signatures by Thomas Crafts, as will warrant a verdict for the plaintiffs.

The question upon this point is not whether in the opinion of the court, upon the facts proved, and such inferences as they might draw from them, the verdict should have been returned for the defendants, but whether there were not such facts presented in evidence as authorized the submission of the case to the jury, under proper instructions from the court as to the law, and from which facts the jury might infer and find an adoption of the signatures.

This question, though presented by the bill of exceptions, seems hardly raised upon the brief of the defendants.

The judge was, in our opinion, authorized to submit the evidence that had been introduced to the jury, under proper instructions. The evidence was not of that decided character that would exist under a case of an express declaration that the party

would adopt the signature; but it had many facts, tending to satisfy the jury that he recognized and adopted the signatures as his own, and assumed the liability of an original promisor. There were shown the relationship of Thomas Crafts to the party who had signed his name; his knowledge of various similar acts on previous occasions, not disclaimed by him; his silence when the claim was made on him, as the party liable by reason of such signature; his statement that he knew that the paper was overdue and ought to have been attended to, that it should be arranged or settled, and that he had property enough to pay all the notes, but had not the ready money. The evidence also precluded any mistake of the fact on his part, as to the character of the notes, and whether or not it was his personal signature upon them; and it did not therefore present the case of admissions or silence under a mistaken belief that the signatures were genuine. In this respect, a marked difference exists between the present case and that of *Hall vs. Huse*, 10 Mass. 39. In that case, the ground of defense was wholly that of a mistake on the part of the defendant as to the real character of the note. He had supposed the note to bear a genuine signature of his, and all his acts of adoption and ratification proceeded upon that false assumption. In the present case, the acts and admissions of the defendant were with full knowledge that the signatures were not in his hand-writing.

In addition to the evidence already alluded to, there was evidence of the plaintiffs' withholding any proceedings to enforce their claims against other parties, after the alleged adoption of the signatures, and the fact that Martin Crafts left his place of residence for the time, and other circumstances to be considered by the jury upon the questions submitted to them.

Without expressing any opinion upon the weight of the evidence, so far as the same is presented by the bill of exceptions, it is sufficient on this point to say, that the case was properly submitted to the jury to pass upon.

Defendants' exceptions overruled.

NOTE.—See also *Hefner vs. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Commercial Bank vs. Warren*, 15 N. Y. 577; *Cravens vs. Gillilan*, 63 Mo. 28; *First National Bank vs. Gay*, 63 Mo. 33; *Harper vs. Devene*, 10 La. Ann. 724; *Wellington vs. Jackson*, 121 Mass. 157; *Forsythe vs. Bonta*, 5 Bush (Ky.) 547.

Contra.—See following case and notes.

(114 INDIANA 275, 5 AM. ST. REP. 613.)

HENRY vs. HEEB.

(Supreme Court of Judicature of Indiana, November, 1887.)

R. Conner, H. L. Frost, and *J. I. Little,* for the appellants.

J. F. McKee, and *D. W. McKee,* for the appellee.

MITCHELL, C. J. This was a suit by Nicholas Heeb against Henry Heeb, John F. Schonert, and James D. Henry, to recover the amount of two promissory notes signed by Heeb and Schonert, who were partners as principals, and by James D. Henry as surety.

The controversy is between the plaintiff and the appellant Henry, and relates exclusively to the note described in the second paragraph of the complaint, the execution of which Henry denied under oath. To the denial of the latter, the plaintiff replied, in substance, that the defendant, after having obtained full knowledge that the plaintiff held the note in controversy, ratified and confirmed the same, and promised to pay it, and accepted a chattel mortgage covering the partnership property of Heeb and Schonert, the principal debtors, as indemnity against any liability which might exist on account of his having become surety on the note. This was held to be a sufficient reply.

While there was much evidence tending to prove that the signature of Henry, as it appeared on the note, was his genuine signature there was also evidence tending to prove that it was not genuine. The extent to which the evidence went in that regard was to affirm the genuineness of the signature on the one hand, and to deny it on the other. There was no evidence tending to incriminate any particular person, or directly pointing to any one as having perpetrated the crime of forgery in respect to the appellant's signature. Besides, there was evidence which tended to show that one of the principal makers of the note had, with the appellant's consent, filled out blank notes, which had been previously signed by the latter as surety, and upon which the firm subsequently obtained loans of money.

The appellant testified that he neither signed nor authorized any one to sign his name to the note, "to the best of his knowledge."

There was some evidence tending to show that Henry recognized the validity of the note, and his liability to pay it, and that he had

knowledge of the execution of a chattel mortgage by Schonert in the firm name to secure him and other creditors of the firm, and that the note in suit was one of the claims mentioned in the mortgage as having been signed by Henry as surety for Heeb and Schonert.

Relevant to the issue made by the plea of *non est factum*, and the reply thereto, and the evidence pertaining to that feature of the case, the court instructed the jury, in substance, that if the appellant, after having obtained full knowledge upon the subject of whether or not he executed the note, ratified and confirmed the same, and promised to pay it, he would be liable for the amount thereof. The judgment was favorable to the plaintiff below. The ruling on the demurrer to the reply, and the giving of the above instructions, are complained of as a cause for the reversal of the judgment. The reply and the instruction present substantially the same question.

It does not appear that the promise of the appellant induced the plaintiff to change his position in any manner, or that in reliance thereon he surrendered any right or benefit whatever. There is, therefore, no element of estoppel in the case as presented either in the pleading or in the instruction of the court.

The appellant contends that a person whose name has been forged to a note cannot ratify or adopt the criminal act, so as to become bound, unless facts have intervened which create an estoppel, and preclude him from setting up as a defense that his signature is not genuine. There appears to be an irreconcilable conflict in the decisions of the courts of last resort on this question. Thus in *Wellington vs. Jackson*, 121 Mass. 157, the supreme judicial court of Massachusetts, following its earlier decisions, held that one whose signature had been forged to a promissory note, who yet, with knowledge of all the circumstances, and intending to be bound by it, acknowledged the signature, and thus assumed the note as his own, was bound to the same extent as if the note had been signed by him originally, without regard to whether or not his acknowledgment amounted to an estoppel in *pais: Greenfield Bank vs. Crafts*, 4 Allen, 447 (*ante* ——); *Bartlet vs. Tuckor*, 104 Mass. 336 (341); 6 Am. Rep, 240. To the same effect is *Hefner vs. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Fitzpatrick vs. School Commissioners*, 7 Humph. 224, 46 Am. Dec. 76.

There are other cases which, while seeming to lend support to the doctrine that a forged signature may be ratified, nevertheless turn

upon the proposition that the holder of the note had in some way acted in reliance upon the promise or admission of the person whose name appeared on the note, or that the latter had received or participated in the consideration for which the note had been given, and was therefore estopped to deny the genuineness of his signature. Still other decisions depend upon principles which distinguish them from cases involving the doctrine of ratification or adoption of forged instruments purely: *Casco Bank vs. Keene,* 53 Me. 103; *Forsyth vs. Day,* 46 Id. 176; *Corser vs. Paul,* 41 N. H. 24, 77 Am. Dec. 753; *Woodruff vs. Munroe,* 33 Md. 146; *Union Bank vs. Middlebrook,* 33 Conn. 95; *Livings vs. Wiler,* 32 Ill. 387; *Commercial Bank vs. Warren,* 15 N. Y. 577; *Crout vs. DeWolf,* 1 R. I. 393; *McKenzie vs. British Linen Co.,* L. R. 6 App. Cas. 82; *Forsythe vs. Banta,* 5 Bush, 548.

It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such a case the principal is bound to the same extent as if the act had been done in the first instance by his previous authority, and this is so whether the act be detrimental to the principal or to his advantage, or whether it be founded in tort or in contract. The reason is, that there was an open assumption to act as the agent of the party who subsequently adopted the act. The agency having been knowingly ratified, the ratification becomes equivalent to original authority. *Wilson vs. Tumman,* 6 Man. & G. 236; *Smith vs. Tramel,* 68 Iowa, 488. So, if a contract be voidable on account of fraud practiced on one party, or if for any reason it might be avoided, yet if the party having the right to avoid the contract, being fully informed, deliberately confirms or ratifies it, even though this be done without a new consideration, and after acts have been done which would have released the person affected, the party thus ratifying is thereby precluded from obtaining the relief he otherwise might have had. *Williams vs. Boyd,* 75 Ind. 286.

The ratification or adoption of a forged instrument, or of a contract which is prohibited by law, or made in violation of a criminal statute involves altogether different principles. One who commits the crime of forgery by signing the name of another to a promis-

sory note does not assume to act as the agent of the person whose name is forged. Upon principle, there would seem to be no room to apply the doctrine of ratification or adoption of the act in such a case. Where the act done constitutes a crime, and is committed without any pretense of authority, it is difficult to understand how one who is in a sense the victim of the criminal act may adopt or ratify it, so as to become bound by a contract to which he is to all intents and purposes a stranger, and which as to him was conceived in a crime and is totally without consideration. As has been well said, it is impossible in such a case to attribute any motive to the ratifying party but that of concealing the crime and suppressing the prosecution: "For why should a man pay money without consideration when he himself had been wronged, unless constrained by a desire to shield the guilty party?"

The distinction made in many well-considered cases seems to be this: Where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions, upon which others may have changed their relations, from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it. *Shisler vs. Vandike,* 92 Pa. St. 447, 37 Am. Rep. 702; *McHugh vs. County of Schuylkill,* 67 Pa. St. 391, 5 Am. Rep. 445; *Workman vs. Wright,* 33 Ohio St. 405, 31 Am. Rep. 546, and note; *Owsley vs. Philips,* 78 Ky. 517; *Brooke vs. Hook,* 24 L. T. 34; 2 Daniel on Negotiable Instruments, 1351, 1353; 2 Randolph on Commercial Paper, sec. 629.

In a case of a known or conceded forgery, we are unable to discover any principle upon which a subsequent promise by the person whose name was forged can be held binding in the absence of an estoppel *in pais,* or without a new consideration for the promise. *Workman vs. Wright, supra; Owsley vs. Philips, supra.*

Notwithstanding the elaborate argument of counsel, our conclusion is that neither the reply nor the instructions as applied to the evidence in the case before us presents the question of the ratification of a forged instrument.

The case was contested upon the one side on the theory that the signature on the note was the appellant's genuine signature. There was no question of forgery involved in the case. There was no evidence pointing to the crime of forgery on the part of any one. The question was whether the note had been signed by the

appellant, or by some one duly authorized by him. For anything that appears either in the reply or in the evidence, it may as well be assumed, if the appellant's name was not signed by himself that it was signed by another under pretense of authority.

As we have seen, if the appellant's name was signed by some one who assumed to act as his agent, or under pretense or color of authority, ratification, understandingly, either by an express promise to pay, or by accepting a chattel mortgage as indemnity, would be equivalent to previous authority.

The ratification which the law interdicts relates only to such acts as clearly appear to have been done in violation of a criminal statute, the motive of the ratifying party being presumably the concealment of the crime or the suppression of its prosecution. Where, however, as in the present case, the act ratified is of an ambiguous character, and may as well be attributed to a mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act; nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted.

These conclusions lead to an affirmance of the judgment. Judgment affirmed, with costs.

NOTE—See also *Wilson vs. Hayes*, 40 Minn. 531; *Williams vs. Bailey*, L. R. 1 H. L. 200.

III.

WHO MAY RATIFY.

Ratification by state; see *State vs. Torinus*, 26 Minn. 1, 37 Am. Rep. 395.

Ratification by corporations; see *McArthur vs. Times Printing Co., post.* 128 ; *Bell's Gap R. R. Co. vs. Christy, post.* p. 131.

Ratification by municipal corporations; see *Town of Bruce vs. Dickey*, 116 Ill. 527.

Ratification by infant; see *Armitage vs. Widoe*, 36 Mich. 124; *Trueblood vs. Trueblood, ante*, p. 29; *Patterson vs. Lippincott, post*, p. ——.

(2 WALLACE 24.)

DRURY vs. FOSTER.

(United States Supreme Court, December, 1864.)

Mrs. Foster executed and acknowledged a mortgage on land which she owned with the name of the mortgagee and amount in blank, and entrusted it to her husband to secure a loan for a few hundred dollars. Her husband borrowed $12,800 of Drury, filling in the latter's name and the amount, Drury being ignorant that these items were not inserted before execution. Mrs. Foster was ignorant of the amount borrowed and received no benefit from it. In an action to foreclose the mortgage, she set up these facts on a defense and succeeded in the court below.

Mr. Peckham, for Drury.

Mr. Carlisle, contra.

Mr. Justice NELSON delivered the opinion of the court. By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a *feme covert,* is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney.

These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint.

Now, it is conceded, in this case, that the instrument Mrs. Foster signed and acknowledged was not a deed or mortgage; that, on the contrary, it was a blank paper; and that in order to make it available as a deed or mortgage, it must be taken to have been signed and acknowledged with the design to have the blanks filled by the husband, or some other person, before the delivery. We agree—if she was competent to convey her real estate by signing and acknowledging the deed in blank, and delivering the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance—that its validity should not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or condi-

tion to a sealed instrument, the better opinion, at this day, is that the power is sufficient.

But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage; and second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete, Till then there was no deed to be acknowledged. The act of the *feme covert* and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.

It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of *feme coverts*. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. The consequences of such a system are apparent, and need not be stated.

There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that acts of the officer for this purpose are judicial and conclusive. We express no opinion upon the soundness of this doctrine, as it is not material in this case. The case before us is very different. There is no defect in the form of the acknowledgment, or in the private examination. No inquiry is here made into them. The defect is in the deed, which it is not made the duty of this officer to write, fill up or examine, and for the legal validity of which he is in no way responsible. The two instruments are distinct. The deed may be filled up without any official authority, and may be good or bad. The acknowledgment requires such authority. The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was therefore nugatory. The truth is that the

acknowledgment in this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*. The argument in support of its validity would be equally strong.

Our opinion is that, as it respects Mrs. Foster, the mortgage is not binding on her estate. * * *

Decree affirmed.

NOTE.—In *Allen vs. Withrow*, 110 U. S. at p. 128, the court speaking of a similar deed say: "The deed in blank passed no interest, for it had no grantee. The blank intended for the name of the grantee was never filled, and until filled the deed had no operation as a conveyance. It may be, and probably is, the law in Iowa, as it is in several States, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank. *Swartz vs. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470; *Van Etta vs. Evenson*, 23 Wis. 33, 9 Am. Rep. 486; *Field vs. Stagg*, 52 Mo. 534, 14 Am. Rep. 435. As said by this court in *Drury vs. Foster*, 2 Wall, 24 at p. 33. 'Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is, that the power is sufficient.'

But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named. Allen, to whom it is stated the deed was handed, with authority to fill the blank and then deliver the deed, gave it to his wife without filling the blank and she died with the blank unfilled."

(75 VIRGINIA, 168.)

FORBES vs. HAGMAN.

(Court of Appeals of Virginia, January, 1881.)

Action for false imprisonment brought by Hagman and others against Forbes and Allers. The prosecution complained of was instituted by one David Mann, who was agent of defendants, and grew out of certain contracts which Mann had made with the plaintiffs for the sale to him of bricks manufactured by defendants. Plaintiffs recovered and defendants brought error.

Wise & Cosby and *Guy & Gilliam*, for appellants.

Jos. Bryan and *John B. Young*, for appellee.

BURKS, J. * * * The defendants resided in Baltimore, Maryland, and Mann, who resided in Virginia, was their general agent in the management of their business, including the collection of debts in this State. He acted by their authority in the institution and prosecution of the proceeding complained of, and they are as responsible for his conduct in the matter as if they had acted in person. His acts were their acts. It cannot be justly claimed for them that in the particular matter which is the ground of action he exceeded his authority, and that therefore they are not accountable; for it distinctly appears that after they had been apprised of the arrest and imprisonment through Mann's agency, they approved and adopted what had been done by him. Indeed, before any contract had been consummated between the plaintiffs and defendants for the sale and delivery of the bricks, one of the defendants (they being partners) cautioned their agent to be very careful, as "government contractors," he said, "were often slippery fellows;" and about ten days after the arrest he came to Richmond, and was there informed by the agent that he had two government contractors (the plaintiffs) in jail at the suit and on account of the firm. He made no inquiry as to the grounds of the arrest, gave no directions and took no steps for their relief or discharge, but merely remarked "that it had resulted as he expected."

This was a virtual ratification and adoption of what had been done by the agent on the principle *omnis ratihabitio retrotrahitur et mandato priori aequiparatur,* which applies as well to a tort, when done to the use or for the benefit of him who subsequently adopts it, as to a matter of contract. It was said by Lord COKE that "he that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." 4 Inst. 317. So that the test of liability in such a case is said to be the consideration whether the act was originally intended to be done to the use or for the benefit of the party who is afterwards said to have ratified it. Broom's Leg. Max. 837. (Marg).

Chief Justice TINDALL, in *Wilson vs. Tumman,* 6 Man. & Gr. (46 Eng. C. L. R.) 236, states the rule more fully thus: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detri-

ment or advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority." For further illustrations of the application of the principle see Broom's Leg. Max. 866 *et seq.*; Cooley on Torts, 127–131.

The case of *Lewis vs. Read*, 13 Mees & Welsb. 834, cited by both of these authors, has a strong bearing on the case in judgment. As stated, a landlord authorized bailiffs to distrain for rent due to him from the tenant of a farm, directing them not to take anything except on the demised premises. The bailiffs distrained cattle of another person (supposing them to be the tenant's) beyond the boundary of the farm; the cattle were sold, and the landlord received the proceeds. It was held that the landlord was not liable in trover for the value of the cattle, unless it were found by the jury that he ratified the act of the bailiffs with the knowledge of the irregularity, or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts.

Now, the defendants in the present case were partners in business and each therefore was agent for the other in the partnership matters, and when one of them received information from their common agent, that the latter had in their names and for their use and benefit instituted a suit against the plaintiffs and caused them to be arrested and detained in prison, they chose, "without inquiry," (as it is expressly proved), to take the risk upon themselves, and to adopt their agent's acts as their own. They certainly ought to be in fact, as in law they are, bound by these acts. * * * * Affirmed.

NOTE—See *Chouteau vs. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Baldwin vs. Leonard*, 39 Vt. 260, 94 Am. Dec. 324.

(75 MICHIGAN, 197.)

THE IRONWOOD STORE CO. vs. HARRISON AND GREEN.

(Supreme Court of Michigan, June, 1889.)

Assumpsit, to recover for goods alleged to have been sold and delivered by the Store Company, a corporation, to Harrison and Green. The goods were ordered by one Nickolson, who, as the

plaintiff alleged, was the agent of defendants for that purpose. There was some testimony offered to prove such agency, but plaintiff relied chiefly upon an alleged ratification of his acts.

Plaintiff recovered and defendants bring error.

M. M. Riley, for appellant.

Hammond & Buck and *D. E. Corbett,* for plaintiff.

CHAMPLIN, J. (After holding that the statements of an alleged agent, made in a matter not connected with his principal, have no tendency to prove such agency, and that orders not in controversy drawn by the alleged agent upon other parties, without the knowledge of the alleged principal and never recognized or paid by him, have no such tendency.) The main question turned upon the controversy whether Harrison and Green had ratified the act of Nickolson in ordering the goods. To show ratification, the plaintiff introduced testimony tending to show that, after the goods had been furnished, plaintiff, through Atkinson, presented the bill thereof to one A. D. McDougal, who represented himself as agent of Harrison & Green.

Atkinson testified that he presented three bills to McDougal, who looked them over, and told him to take the Guido & Warner bill to Nickolson, and have him O K it, and he would pay it the next day; that he did present the bill to Nickolson, and he marked it "O K" and signed his name; that he afterwards saw it in Harrison & Green's office, in Bessemer, O K'd by Nickolson. The bill was afterwards produced in court with the O K of Nickolson upon it. Another bill called the "tie-bill," McDougal handed to Mr. Chamberlain and told him "to see to that." For the small bill of $36.20, which had been ordered by McDougal, he told him he would have a check sent, which he did. It was admitted upon the trial by counsel for defendants that McDougal was agent for Harrison & Green.

Mr. McDougal was also sworn as a witness of defendants, and he testified that in April and May that he was superintendent of the South Shore Road for Harrison & Green; that his authority was to represent them in everything connected with the construction of the road. Whenever it was necessary to obtain supplies, he was to get them.

The plaintiff claims that this testimony tends to prove a ratification by Harrison & Green, through their agent McDougal, and by his promise to pay, plaintiff has been lulled into security, when

it might have commenced its attachment suit sooner, as Harrison & Green were non-residents.

In some cases an agent may ratify the unauthorized act of another agent; as—

"Where the act which, when done by one agent, was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second." Mechem Ag. sec. 121.

Ratification by an agent depends upon certain facts, which must affirmatively be made to appear:

"1. The agent ratifying must have had general power to do himself the act which he ratifies.

"2. They must both be agents of the same principal, and the agent whose act is in question must have professed to act as agent of the common principal."

A stranger to a party, acting without authority, may do an act in the name of another, which that other may ratify, and so make it his own. But his general agent has no such authority to ratify the act of a stranger done in the name of the principal, unless power of appointing agents has been delegated to him by his principal. He cannot ratify without making the person for that act or occasion the agent of the principal, and this is beyond his general powers as agent.

Nickolson did not represent himself to plaintiff as being an agent for defendants. There is no testimony in the case tending to show that Nickolson at the time he purchased the supplies was the agent of defendants. The act, so far as Harrison & Green are concerned, was the act of a stranger making the purchase without authority from them, and not even in their name. McDougal, therefore, had no authority to ratify or bind Harrison & Green by any promise of payment. Nor could he estop the defendants from denying their liability by promising to pay, if Nickolson would O. K. the account. We think the case comes within the principles of the following cases: *Wells vs Martin*, 32 Mich. 478; *Danaher vs. Garlock*, 33 Id. 295; *Frost vs. Lawler*, 34 Id. 235; *Hammerslough vs. Cheatham*, 84 Mo. 13.

It follows that the judgment must be reversed, and a new trial granted.

NOTE—See *Trudo vs. Anderson*, 10 Mich. 357, 81 Am. Dec. 795; *Penn vs. Evans*, 28 La. Ann. 576; *Palmer vs. Cheney*, 35 Iowa, 281; *Mound City*

Mut. L. Ins. Co. vs. Huth, 49 Ala. 530; *Cairo, etc., R. R. Co. vs. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Toledo, etc., R. R. Co. vs. Rodrigues*, 47 Ill. 188, 95 Am. Dec. 484.

IV.

CONDITIONS OF RATIFICATION.

(12 MEESON & WELSBY, 225.)

FOSTER, ADMR. vs. BATES.

(English Court of Exchequer, November, 1843.)

Assumpsit by plaintiff as administrator of one Pollard, deceased, for goods sold and delivered by the intestate, and also for goods sold and delivered by the plaintiff after his death and before administration was granted. Verdict for plaintiff with leave to defendants to move for non-suit, which was done.

W. H. Watson & Greenwood, contra.

Hoggins and *Kelly*, for the motion.

PARKE, B. In this case, which was argued a day or two ago, we delayed giving our judgment, not on account of any doubt we entertained at the time, but in order that we might refer to the several authorities cited at the bar. We are of the opinion that the rule to enter a non-suit must be discharged. The only question is whether the plaintiff could sue for goods sold and delivered by him as administrator of one Pollard, upon the facts which were in evidence on the trial. It appeared that the goods were sold after the death of the intestate, and before the grant of letters of administration, by one who had been the agent of the deceased on the coast of Africa; and that they were there sold avowedly on account of the estate of the intestate.

It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the Court of Common Pleas, in the case of *Thorpe vs. Stallwood*, 12 Law J. N. S. 241, where an action of trespass was held to be maintainable. The reason for

this relation given by ROLLE, C. J., in *Long vs. Hebb*, Styles, 341, is that otherwise there would be no remedy for the wrong done.

The relation being established for the benefit of the intestate's estate against a wrong-doer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party; and cases might be put in which the right to sue on the contract would be more beneficial to the estate than the right to recover the value of the goods themselves. In the present case, there is no occasion to have recourse to the doctrine that one may waive a tort and recover on a contract; for here the sale was made by a person who intended to act as agent for the person, whoever he might happen to be, who legally represented the intestate's estate; and it was ratified by the plaintiff, after he became administrator; and, when one means to act as agent for another, the subsequent ratification by the other is always equivalent to a prior command; nor is it any objection that the intended principal was unknown, at the time, to the person who intended to be the agent; the case of *Hull vs. Pickersgill*, 1 Bro. and B. 282, cited by Mr. Greenwood, being an authority for that position. We are, therefore, of the opinion that the plaintiff is entitled to recover.

Rule discharged.

(48 MINNESOTA, 319, 31 AM. ST. REP. 653.)

McARTHUR vs. TIMES PRINTING COMPANY.

(Supreme Court of Minnesota, February, 1892.)

Action by D. A. McArthur against the Times Printing Company to recover damages for a breach of contract. Judgment for plaintiff. Defendant appeals.

George F. Edwards, for appellant.

F. B. Wright, for respondent.

MITCHELL, J. The complaint alleges that about October 1, 1889, the defendant contracted with plaintiff for his services as advertising solicitor for one year; that in April, 1890, it discharged him, in violation of the contract. The action is to recover damages for the breach of the contract. The answer sets up two defenses: (1) That plaintiff's employment was not for any stated time, but only from

week to week; (2) that he was discharged for good cause. Upon the trial there was evidence reasonably tending to prove that in September, 1889, one C. A. Nimocks and others were engaged as promoters in procuring the organization of the defendant company to publish a newspaper; that, about September 12th, Nimocks, as such promoter, made a contract with plaintiff, in behalf of the contemplated company, for his services as advertising solicitor for the period of one year from and after October 1st,—the date at which it was expected that the company would be organized; that the corporation was not, in fact, organized until October 16th, but that the publication of the paper was commenced by the promoters October 1st, at which date plaintiff, in pursuance of his arrangement with Nimocks, entered upon the discharge of his duties as advertising solicitor for the paper; that after the organization of the company he continued in its employment in the same capacity until discharged, the following April; that defendant's board of directors never took any formal action with reference to the contract made in its behalf by Nimocks, but all of the stockholders, directors, and officers of the corporation knew of this contract at the time of its organization, or were informed of it soon afterwards, and none of them objected to or repudiated it, but, on the contrary, retained plaintiff in the employment of the company without any other or new contract as to his services.

There is a line of cases which hold that where a contract is made in behalf of, and for the benefit of, a projected corporation, the corporation, after its organization, cannot become a party to the contract, either by adoption or ratification of it. *Abbott vs. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193; Beach, Corp. § 198. This, however, seems to be more a question of name than of substance; that is, whether the liability of the corporation, in such cases, is to be placed on the grounds of its adoption of the contract of its promoters, or upon some other ground, such as equitable estoppel. This court, in accordance with what we deem sound reason, as well as the weight of authority, has held that, while a corporation is not bound by engagements made on its behalf by its promoters before its organization, it may, after its organization, make such engagements its own contracts. And this it may do precisely as it might make similar original contracts; formal action of its board of directors being necessary only where it would be necessary in the case of a similar original contract. That it is not

requisite that such adoption or acceptance be express, but it may be inferred from acts or acquiescence on the part of the corporation, or its authorized agents, as any similar original contract might be shown. *Battelle vs. Pavement Co.*, 37 Minn. 89. See, also, Mor. Corp. § 548. The right of the corporate agents to adopt an agreement originally made by promoters depends upon the purposes of the corporation and the nature of the agreement. Of course, the agreement must be one which the corporation itself could make, and one which the usual agents of the company have express or implied authority to make. That the contract in this case was of that kind is very clear; and the acts and acquiescence of the corporate officers, after the organization of the company, fully justified the jury in finding that it had adopted it as its own.

The defendant, however, claims that the contract was void under the statute of frauds, because, "by its terms, not to be performed within one year from the making thereof," which counsel assumes to be September 12th,—the date of the agreement between plaintiff and the promoter. This proceeds upon the erroneous theory that the act of the corporation, in such cases, is a ratification, which relates back to the date of the contract with the promoter, under the familiar maxim that "a subsequent ratification has a retroactive effect, and is equivalent to a prior command." But the liability of the corporation, under such circumstances, does not rest upon any principle of the law of agency, but upon the immediate and voluntary act of the company. Although the acts of a corporation with reference to the contracts made by promoters in its behalf before its organization are frequently loosely termed "ratification," yet a "ratification," properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. *In re Empress Eng. Co.*, 16 Ch. Div. 128; *Melhado vs. Railway Co.*, L. R. 9 C. P. 505; *Kelner vs. Baxter*, L. R. 2 C. P. 185. What is called "adoption," in such cases, is, in legal effect, the making of a contract of the date of the adoption, and not as of some former date. The contract in this case was, therefore, not within the statute of frauds. The trial court fairly submitted to the jury all the issues of fact in this case, accompanied by instructions as to the law which were exactly in the line of the views we have expressed; and the evidence justified the verdict.

The point is made that plaintiff should have alleged that the contract was made with Nimocks, and subsequently adopted by the defendant. If we are correct in what we have said as to the legal effect of the adoption by the corporation of a contract made by a promoter in its behalf before its organization, the plaintiff properly pleaded the contract as having been made with the defendant. But we do not find that the evidence was objected to on the ground of a variance between it and the complaint. The assignments of error are very numerous, but what has been already said covers all that are entitled to any special notice.

Order affirmed.

Note—See following case and notes.

(79 Pennsylvania State, 54, 21 Am. Rep. 39.)

BELL'S GAP RAILROAD COMPANY vs. CHRISTY.

(Supreme Court of Pennsylvania, October, 1875.)

Action of assumpsit to recover money expended by plaintiff in procuring the charter of the defendants, in payment of surveyors, etc., in making explorations and running the line of their road, etc., and also for his own services in the same matter. The whole occurred before the corporation came into existence, but plaintiff claimed that the defendants having accepted the results of his work, etc., they became liable to pay him.

D. J. Neff, for plaintiff in error.

S. S. Blair, for defendant in error.

Paxson, J. This case lacks all the elements of a contract, either express or implied. The most that it amounts to is the expenditure by the plaintiff of a certain amount of his time and money in the furtherance of the scheme of constructing a railroad. He attended meetings; visited Harrisburg for the purpose of obtaining a charter; assisted in making a preliminary survey, and paid some of the expenses thereof. There was no contract with anyone for the payment of his services, beyond the statement of some of the parties interested in the project that they would see him paid. All this

was prior to the charter, or to any organization of the company. The road which the plaintiff had in view when he made the survey, as appears from his own testimony, was a broad gauge road, to run from Bell's Mills to Erie, and he evidently relied upon aid from New York capitalists to build it, with the expectation of retaining an important position in the company. He did not succeed in obtaining the required aid, and the road to Erie was never constructed or even commenced. Instead thereof, a short local narrow-guage road, called the Bell's Gap Railroad, was built, with the object in part to develop certain coal lands in the vicinity. The stock was principally taken in the neighborhood. The plaintiff, and others interested with him, were among those named as corporators in the act incorporating the company, but they failed to obtain the control of the organization. Subsequently, the plaintiff brought suit against the company to recover compensation for his services, as before stated, claiming that the company were bound by the promises of the original projectors of the enterprise, inasmuch as said company had accepted the result of his labors and enjoyed its benefits.

None of the cases cited by the defendant in error sustains his position. The *Erie & Waterford Plankroad Company vs. Brown*, 25 Pa. St. 156; and the *Bedford Railroad Company vs. Bowser*, 48 Id. 29, were suits upon subscriptions to stock. The case of the *Edinboro' Academy vs. Robinson*, 37 Penn. St. 210, 78 Am. Dec. 421, was a subscription in aid of an academy. There is not the slightest analogy between either of these cases and the one under consideration. In *Preston vs. The Liverpool, etc., Junction Railroad Company*, 1 Sim. (N. S.) 586, 7 Eng. Law & Eq. Rep. 124, the contract was between the plaintiff and an organized company. This was a case where the projectors agreed to pay the complainant £5,000 for the land to be taken for the railway and incidental damages, and the plaintiff thereupon assented that his land should be so taken. The agreement was in writing between the plaintiff and the executive directors of Lancashire & North Yorkshire Railway Company, which was after united with another rival enterprise, under the name of the defendant corporation, and the two companies agreed to adopt the contract with the plaintiff. It is true the company had not yet obtained its charter, but it was still an organization *in esse*, had a board of directors who assumed to make contracts binding upon the company when it should become thereafter fully clothed with

corporate powers. In *Low v. The Railroad Company*, 45 N. H. (1 Hadley) 375, a charter had been obtained and the services for which the suit was brought were rendered in promoting the organization of the company under the charter, procuring subscriptions to the capital stock, etc. It was held by the court in that case that, "where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete the organization, and after it has been perfected, the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, it will be held liable to pay for the services upon the ground that it must take the burden with the benefit; but that 'no promise to pay would be implied from the fact that such services were rendered at the request of any number of the corporators less than a majority.'"

We do not desire to controvert the principle, established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterward, then if the body for whom the projectors assumed to act does come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform. Conceding to this principle its full force and effect, we are unable to see its application to the facts of this case. It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such acts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits *cum onere*, and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to evidently must be a majority at least of such persons, and not one, two, or three, or a small minority thereof. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized.

In this case the two or three persons who, it is alleged, promised

the plaintiff to see him paid, bound no one but themselves. They had no authority to speak for anyone else. In the absence of any such authority and of any satisfactory proof that the result of the plaintiff's labor and expenditure was accepted and enjoyed by the corporation, that it used the plaintiff's survey or located its road upon any considerable portion of the line thereof, the court below should have instructed the jury that the defendants were not liable.

It is to be observed that in all the cases which were brought to the attention of the court, the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization, as in the case cited in 7 Eng. Law & Eq. Rep., preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one. * * *

The judgment is reversed and a *venire facias de novo* awarded.

NOTE—In *Rockford, etc., R. R. Co. vs. Sage*, (1872) 65 Ill. 328, 16 Am. Rep. 587, it is said—

"For services and expenses before the organization of the company, which, subsequently, the company acccepts and receives the benefit of and promises to pay for, we will not say that a party might not recover, in virtue of such express promise; but we are disposed to deny the right of recovery for such services and expenses upon any implied promise resulting from the fact, although the case cited by appellant's counsel, of *Low vs. Conn. Passumpsic River R. R. Co.*, 46 N. H. 284, seems to sanction such a right of recovery; as does also the case of *Hall vs. Vt. & Mass. R. R. Co.*, 28 Vt. 401, as respects services rendered subsequent to the act of incorporation, and prior to perfecting the organization of the company, but not for services rendered prior to the act of incorporation.

"A right of recovery against a corporation, for anything done before it had a proper existence, does not appear to rest upon any very satisfactory legal principle.

"It appears more reasonable to hold any services performed or expenses incurred prior to the organization of a corporation, to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation. It seems unjust to stockholders, who subscribe and pay for stock in a company, that their property should be subject to the incumbrance of such claims, and which they had no voice in creating.

"*N. Y. & N. H. R. R. Co. vs. Ketchum*, 27 Conn. 170, is an authority which denies the liability of a corporation on account of services rendered prior to the perfecting of its organization; and we accept the authority of that case as, in our judgment, establishing the more just and satisfactory rule.

"In the language of that case, 'it is soon enough for corporate bodies to enter into contracts, incumbering their property, when they are duly organized according to their charters and have their chosen and impartial direct-

ors to conduct their business.' To the same effect are *Franklin Fire Insurance Co. vs. Hart*, 31 Md. 59, and *Safety Life Deposit Ins. Co. vs. Smith*, 65 Ill. 309."

See *Stanton vs. New York, etc., Ry. Co.*, 59 Conn. 272, 21 Am. St. Rep. 110, note; *Whitney vs Wyman*, 101 U. S. 392 *post* ——.

In the note to *Pittsburg Mining Co. vs. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149 it is said: "In the note to *Moore & H. H. Co. vs. Towers H. Co.*, 13 Am. St. Rep. 23, the question of the liability of a corporation for contracts entered into by its promotors was considered, and the following conclusions were announced as sustained by the authorities upon that subject: 1. That, as a general rule, a corporation cannot be bound by acts done or promises made in its name or on its behalf before it is in existence, and, therefore, that its promotors have no authority to act or contract for it nor in its name: *Penn Match Co. vs. Hapgood*, 141 Mass. 145; *Abbott vs. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193. 2. That while contracts made in the name or for the benefit of a corporation before its organization are not binding upon it, yet it may adopt or ratify them either in express terms or by implication, as by acting upon them and receiving the benefits thereof, and when it does so, it is either bound by its express contract, or upon the ground of estoppel is not permitted to deny the validity of such contract, nor to refuse to discharge the obligations thereby imposed: *Paxton Cattle Co. vs. First Nat. Bank*, 21 Neb. 621, 59 Am. Rep. 852; *Gooday vs. Colchester & S. V. Ry. Co.*, 17 Beav. 132; *Preston vs. Liverpool & M. N. Ry.*, L. R. 7 Eq. 124; *Wood vs. Wheeler*, 93 Ill. 153; *Edwards vs. Grand Junction Ry. Co.*, 1 Mylne & C. 650; 7 Sim. 337; 6 L. J. (N. S.) Ch. 47; *Reichwald vs. Commercial Hotel*, 106 Ill. 439. It is true that some of the authorities upon this subject deny that it is possible for a corporation to ratify a contract made before its organization, because, they say, the ratification of a contract makes it valid and binding from its inception, and that no contract as against a corporation can be deemed to have an inception or existence before it was possible for the corporation to do any act or enter into any contract; *Abbott vs. Hapgood, supra; In re Empress Engineering Co.*, L. R., 16 Ch. Div. 125; *Kelner vs. Baxter*, L. R. 2 Com. P. 175; *Gunn vs. London Ins. Co.*, 12 Com. B. (N. S.) 694; *Melhado vs. Porto Allegre Ry.* L. R. 9 Com. P. 503. The effect of these latter decisions, as we understand them, is to affirm that when a contract made by promoters in the name of a corporation is acted upon, and its benefit accepted by the corporation after its organization, this should be regarded, not as a ratification of the old contract, which the corporation had no capacity to make, but as an entering into a new contract of the same purport as the old one."

(82 NEW YORK, 327.)

HAMLIN vs. SEARS.

(New York Court of Appeals, October, 1880.)

This was an action for the conversion of certain barley, admitted to have belonged to plaintiff's assignor, Stanley, but which defendants allege they bought from one Marsh who had authority to sell it. Marsh sold the barley without the knowledge or consent of Stanley, who had never clothed him with any apparent authority to act as his agent, and in making the sale Marsh did not assume to act as Stanley's agent. Defendants claimed that notwithstanding this, Stanley had so ratified the act as to make it his own. The facts relied upon to constitute a ratification were the following: The first car load of the barley was shipped to the defendants December 31, 1872, and the last car load March 7, 1873. In the latter month, Stanley discovered that a large portion of his barley had been taken away; and he made inquiry of Marsh about it and was informed by him that it was in a malt-house in the same village, and he was thus induced to rest easy about it until July, when, by examination at the railroad office, he, for the first time, discovered that it had been shipped to Buffalo. This was about five months after the last barley had been shipped. It did not appear that Stanley thereafter, prior to May, 1874, made any efforts to follow or reclaim the barley, and in that month he made a general assignment for the benefit of his creditors. This claim against the defendants was not inserted in the schedule of Stanley's assets made after the assignment, but he testified that he mentioned it to his attorney at the time the schedule was made. The plaintiff testified that he did not hear of this claim until some time after the assignment was made, and that he first called upon the defendants and made claim upon them for the barley in January, 1875, and that was the first time that they learned of the claim that the barley belonged to Stanley and was wrongfully taken and sold to them.

The referee held that these facts did not amount to a ratification; the General Term reversed his judgment, and plaintiff appealed.

E. A. Nash, for appellant.

Myron H. Peck, for respondents.

EARL, J. (After stating the facts substantially as above.) The

general doctrine that one may, by affirmative acts, and even by silence, ratify the acts of another who has assumed to act as his agent, is not disputed. It is illustrated by many cases to be found in the books, and set forth by all the text writers upon the law of agency. (Story on Agency, § 251a; 2 Greenl. on Ev., §§ 66, 67; 2 Kent's Com. 616; *Thompson vs. Craig*, 16 Abb. [N. S.] 29; *Wilson vs. Tumman*, 6 Mann. & Gr. 236; *Watson vs. Swann*, 11 C. B. [N. S.] 756.) But the doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to an original authority. One may wrongfully take the property of another not assuming to act as agent, and sell it in his own name and on his own account, and in such case there is no question of agency, and there is nothing to ratify. The owner may subsequently confirm the sale, but this he cannot do by a simple ratification. His confirmation must rest upon some consideration upholding the confirmation, or upon an estoppel. (*Workman vs. Wright*, 36 Ohio St. 405.) Here Stanley did no act, and said no word ratifying the sale of his barley. The most that can be claimed is that after he discovered that the barley had been shipped to the defendants he made no efforts to reclaim it, and gave no notice of his title to the defendants. No estoppel can be claimed, as the defendants did not rely upon Stanley's silence, and were not, so far as appears, damaged thereby. So that it comes down to this: When the property of one man is wrongfully taken and sold by another, in his own name and for his own benefit, must the owner, when he afterward discovers the wrong, make efforts to reclaim his property, or notify the purchasers of his claim at the risk of losing his property? There is no authority holding that such a duty rests upon the owner of property wrongfully taken and converted. The mere silence of the owner, under such circumstances, will not bar his claim, if it be short of the time prescribed in the statute of limitations. The rule of *caveat emptor* applies, and the purchaser must see to it that he buys of one who owns the property or has authority to sell.

We have carefully examined all the authorities cited by the learned counsel for the defendants, and it is sufficient to say of them, that they in no degree sustain the novel doctrine contended for by him. The maxim that "he who has been silent when in conscience he ought to have spoken, shall be debarred from speaking when conscience requires him to be silent," cannot be invoked in

this case. It would have been applicable if Stanley had stood by and in silence permitted Marsh to deal in or sell his property, or if hearing that he had taken his property, he had in silence seen the defendants pay him for the property. When he first heard of this wrong, the property had been taken and paid for, and the time when conscience required him to speak was passed. His silence induced no act and did no wrong.

Order reversed and judgment affirmed.

(39 FEDERAL REPORTER, 347.)

WHEELER vs. NORTHWESTERN SLEIGH CO.

(United States Circuit Court, Eastern District of Wisconsin, August, 1889, Before Gresham and Jenkins, JJ.)

The plaintiff sued to recover a dividend declared by defendant upon stock in its company then owned by plaintiff. After the dividend had been declared, plaintiff authorized one Benjamin to sell the stock, expressly reserving the dividend, plaintiff retaining possession of the stock. Benjamin entered into an agreement with Chapman & Goss to sell them the stock with the dividend included. Benjamin wrote plaintiff that he had sold the stock at par, and plaintiff thereupon sent the stock to Benjamin, who delivered it to Chapman & Goss, who thereupon paid him the par value upon the strength of his agreement that the dividend should go with it. There was no formal transfer of the dividend. Plaintiff received the proceeds of the stock in ignorance of Benjamin's agreement that the dividend was to be included. Plaintiff and Chapman & Goss both claiming the dividend, the company paid it to the latter taking indemnity, and plaintiff brought this action. On the trial, Benjamin denied making the agreement, but the jury found against him on this point. A special verdict was taken upon which both parties moved for judgment.

W. J. Turner, for plaintiff.

J. V. & Chas. Quarles and *J. G. Flanders,* for defendant.

JENKINS, J. (After holding that the dividend did not pass as incident to the stock.) It is, of course, correct to say that if a principal puts his agent in a position to impose upon an innocent

third person, by apparently pursuing his authority, he shall be bound by his acts. It is, however, equally true that one dealing with an agent must look to the extent and scope of his agency, and that an implied or ostensible agency is never construed to extend beyond the obvious purpose for which it is apparently created. Here the plaintiff had authorized his agent to sell his shares in the defendant company. He was bound by all such acts of his agent as were within the apparent authority arising from possession of the stock. But that possession did not clothe the agent with apparent authority to sell other property; did not authorize the disposition of a previously declared dividend. The ostensible, as well as actual, authority was limited to disposition of the stock, and that alone. The purchasers had no right to assume that the agent, because the possessor of the stock, was also authorized to sell the dividend, that was no part of and did not pass as an incident to the stock. As to that they dealt with the agent at their peril. Supposing the agent to be acting for himself or his wife, and not for the plaintiff, they were bound to the greater caution to ascertain if there had been a transfer of the dividend by the plaintiff. It is clear that the plaintiff was not bound by any representation or agreement of his agent touching the dividend, because in respect thereto the agent was acting without authority, and beyond the apparent scope of authority flowing from the possession of the stock.

The plaintiff received from Benjamin, and has since retained, the avails of the stock. This the defendant insists works a ratification by the plaintiff of the unauthorized act of the agent. It was doubtless competent for the defendant to have interpleaded these rival claimants to the dividend. *Salisbury Mills vs. Townsend*, 109 Mass. 115. Instead of so doing, it paid to Chapman & Goss the dividend claimed by the plaintiff, and asserts a ratification of the contract to which it was not a party, and in behalf of those who are not before the court, nor bound by its decision. It may well be doubted if the defendant is in position to avail itself of the alleged ratification. Assuming, however, that such defense is availing to the defendant, is ratification shown? It is well established that a ratification of an unauthorized contract, to be effectual and binding upon the one sought to be bound as principal, must be shown to have been made by him with full knowledge of all the material facts connected with the transaction to which it relates, and that the existence of the contract, its nature and con-

sideration, were known to him. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid, because founded upon mistake or fraud. *Owings vs. Hull*, 9 Pet. 629; *Bennecke vs. Insurance Co.*, 105 U. S. 360; *Bloomfield vs. Bank*, 121 U. S. 135, 7 Sup. Ct. Rep. 865; *Rolling-Mill vs. Railway Co.*, 5 Fed. Rep. 852; *McClelland vs. Whitely*, 15 Fed. Rep. 322; *Dickinson vs. Conway*, 12 Allen (Mass.) 491.

The defendant asserting such ratification, was therefore bound to show that it was made by the plaintiff under such circumstances as to be binding upon him, and that all material facts were made known to him. *Combs vs. Scott*, 12 Allen 495, (*post*, 182); *Hardeman vs. Ford*, 12 Ga. 205. Do the facts disclose ratification? The plaintiff authorized his agent to sell the stock, at par. He conferred upon the agent no apparent authority to dispose of anything else. As to the dividend, the purchaser had no right to assume that Benjamin could dispose of it. The possession of the actual ownership of the stock, subsequent to the declaration of the dividend, gave him no apparent authority to sell the dividend. As to that they dealt with Benjamin at their peril. A transfer of the stock vested no legal title to the dividend previously declared. There was no actual transfer of the dividend, and none was demanded. The purchasers are chargeable with knowledge of the law that the dividend did not follow the stock; that the dividend belonged to the plaintiff, and they were bound to inquire, supposing Benjamin to be acting for himself or his wife, as to his or her ownership of this dividend. So far, therefore, the purchasers were negligent; the plaintiff was innocent.

Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. *Bell vs. Cunningham*, 3 Pet. 69, 81; *Hastings vs. Proprietors*, 18 Me. 436; *Bryant vs. Moore*, 26 Me. 87; *Thacher vs. Pray*, 113 Mass. 291; *Navigation Co. vs. Dandridge*, 8 Gill. & J. 248, 29 Am. Dec. 543; *Smith*

vs. Tracy, 36 N. Y. 79 (*post* p. —; *Baldwin vs. Burrows*, 47 N. Y. 199 (*post* p. —); *Smith vs. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Reynolds vs. Ferree*, 86 Ill. 576; *Roberts vs. Rumley*, 58 Iowa, 301 (*post* p. —); *Bohart vs. Oberne*, 36 Kan. 284; *Insurance Co. vs. Iron Co.*, 21 Wis. 458, 464.

So far as the record discloses, the first notice which the plaintiff received that the purchasers of the stock claimed the dividend was about May 7th, when the treasurer of the defendant seems to have advised him thereof, and requested to know if the plaintiff made claim thereto. It does not appear that the grounds of the claim were then disclosed. It would seem probable that the plaintiff understood the claim to be bottomed upon the ground that by law the stock carried dividend previously declared and unpaid,—a ground insisted upon at the trial,—as the plaintiff in his letter of that date speaks of the purchaser undertaking to hold the dividend "under some technicality." There seems to have been no communication between Chapman & Goss and the plaintiff at any time touching their claim.

They asserted no claim, and disclosed no ground of claim. They knew the false representation and agreement, of which the plaintiff was ignorant, and were, I think, bound, if they sought to hold the plaintiff to a ratification of the unauthorized act of his agent, to possess the plaintiff with facts within their knowledge, and not in his, and to assert a claim founded thereon. This they did not do, but, knowing that the plaintiff claimed the dividend, remained passive so far as concerns getting information to him of the grounds of their claim. It cannot surely be said that under such circumstances the retention of the money was an act of affirmance. To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorize his agent to sell his house for $20,000, and the agent selling the house for that sum should include in the sale certain bank stock which he was not authorized to sell, and of which he had no possession, the principal, by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine. The purchaser, had, in the case supposed, no right to trust the agent with respect to the bank stock. He had not the possession of it, and was not clothed with any authority with respect to it.

The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house, in ignorance of the act of the agent with respect to the bank stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous. Upon maturity of the dividend, suit was at once brought against the company. Until the trial the plaintiff was not shown to have knowledge of the facts upon which the claim of the purchasers to the dividend is based. They had not communicated them to him. He could not have learned them from the agent, for he denied the representations and agreement. This was no acquiescence, working ratification of the unauthorized act of Benjamin.

The cases relied upon by the defendant are of the class, either of recognized agency or of acts adopted by the principal as done for him, where a right obtained by the agent is sought to be enforced, or where the principal receives the avails of a contract either authorized or adopted by him. The liability of the principal for the fraud of his agent is bottomed upon the principle that, by adopting the contract made by the agent, and receiving the avails, the principal assumes responsibility for the means adopted to effect the contract; but, as well observed in *Baldwin vs. Burrows, supra,* where the cases are ably reviewed, and the lines of distinction are sharply defined, "this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the unauthorized contract, and the principal retain the proceeds thereof after knowledge of the fact." The present case is not within the class of cases relied upon. The collateral contract for the transfer of the dividend was in excess of any authority, actual or ostensible. The proceeds of the authorized sale of the stock were received in ignorance of the fraud perpetrated by the agent. The amount of such proceeds was the exact amount authorized to be received for the stock. The plaintiff, by retaining the proceeds, adopted and ratified what he had authorized. Such action cannot be tortured into ratification of unauthorized acts. *Smith vs. Tracy* 36 N. Y. 79; *Condit vs. Baldwin,* 21 N. Y. 219, 78 Am. Dec. 137.

GRESHAM, J., concurs. Judgment for plaintiff.

(58 IOWA, 301.)

ROBERTS vs. RUMLEY.

(Supreme Court of Iowa, June, 1882.)

M. & J. Rumley, of La Porte, Ind., held three notes executed by J. H. Hoffman and W. H. Roberts, of Iowa. In form, these notes were joint, but Roberts was in fact surety for Hoffman. The Rumleys also held two other notes signed by Hoffman alone. These notes being due and unpaid, they put them into the hands of their local attorney, W. E. Higgins, and he sent them to Huff & Reed, attorneys, in Iowa, for collection. Huff & Reed put the notes in judgment and taking out execution upon the judgment against Hoffman and Roberts, they levied upon Roberts' stock of goods. In order to procure a release, Roberts suggested to Huff & Reed that he would procure Hoffman to execute a mortgage to the Rumleys upon his homestead to secure the judgments if an extension of time could be procured and the privilege of paying in installments. Huff & Reed wrote to Higgins and the latter advised them to accept the proposition provided $100 was paid at once to apply on fees. The mortgage was executed and Roberts paid in $100 "as surety," which Huff & Reed agreed should be applied on the judgment against Hoffman and Roberts, and they agreed further that the mortgage given by Hoffman to the Rumleys "is assigned to said W. H. Roberts as security for the said sum of $100 he has paid as surety." These agreements were made without authority and without the knowledge of the Rumleys. Default being made in the terms of the mortgage a decree of foreclosure was had which directed that the proceeds should first be applied to paying taxes and costs, and the balance applied *pro rata* upon the judgments. Roberts brought this action to secure the application of the proceeds first to the judgment upon which he was surety, and also, that he be subrogated to the mortgage to the extent of the $100 paid by him. He alleged that provisions to this effect were agreed upon with Huff & Reed and were to have been inserted in the mortgage but were omitted by mistake. Judgment was rendered in his favor and defendants appealed.

E. W. Eastman, for appellant.

W. V. Allen, for appellee.

DAY, J. (After stating the facts.) Whatever agreement was entered into between the parties, was made between plaintiff and Huff & Reed. Huff & Reed, as attorneys, simply for the collection of the notes, had no authority to release the levy upon plaintiff's property and take the mortgage in question, extending the time of payment of one-half of the judgment for one year and seven months, and of the other half for three years and one month. Whatever authority Huff & Reed had in the premises was specially conferred by the letter of Higgins above set out. They were special agents, for a particular purpose, with prescribed and limited powers. They were authorized to secure both judgments, the one upon which plaintiff was not liable as a surety, as well as the one upon which he was so liable. They were not authorized to take a security which should be primarily applied to and perhaps exhausted upon, the judgment which was already secured. If Huff & Reed made the agreement which the plaintiff alleges, they transcended their powers as agents, and their agreement does not bind their principals. It was incumbent upon the plaintiff to ascertain the scope and extent of the powers of the agents with whom he dealt. See Story on Agency, sections 126–133 and notes.

It is said, however, that, even if Huff & Reed transcended their agency, the defendants have adopted and ratified their acts. It does not appear, however, that the defendants ever had any intimation of the agreement which the plaintiff now alleges to exist, and which he is seeking to enforce, until the commencement of this suit. They could not have ratified and adopted an act about which they knew nothing. It is further claimed that the defendants cannot avail themselves of the benefits of the acts of their agents, without also being bound by whatever may be prejudicial to them. This principle applies to the doctrine of agency, with some limitations and qualifications. If the agents had incorporated in the mortgage a provision that the proceeds of the mortgaged property should first be applied to the satisfaction of the judgment upon which Roberts was surety, the defendants could not have accepted the benefits of the mortgage without being bound by this condition, even although the agents had no authority to agree to such conditions.

So, too, if the defendants had known that their agents had agreed to incorporate such a condition in the mortgage, and that it was omitted by mistake, they would, probably, on acceptance of the mortgage, have been bound by the condition. But to hold that

the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract would be entirely subversive of the whole doctrine of special agency, and instead of requiring the person dealing with the agent to ascertain, at his peril, that the agent has kept within his special authority, would require the principal to enquire, at his peril whether the agent had gone beyond it. The case of *Eadie, Guilford, & Co. vs. Ashbaugh,* 44 Iowa 519, and *Beidman vs. Goodell,* 56 Iowa 592, are not inconsistant with this view.

The majority opinion in *Eadie, Guilford & Co. vs. Ashbaugh,* is grounded upon the fact that Allen, who made the sale in question, was not the agent of the plaintiffs and had no authority to sell the machine, with a warranty, but that he assumed to act as agent and sold the machine with a warranty. In *Beidman vs. Goodell,* also, it appears from the opinion that the persons by whose acts the plaintiff was bound by ratification, acted entirely without authority. Where a person assumes without authority to act as the agent of another, the principal cannot be bound at all by the acts unless he ratifies the same. In such cases he cannot adopt the act in part, and repudiate it in part. "Where a contract is an entirety and is wholly unauthorized, and the principal takes the benefit of it, he must take it with the obligations which make a part of it." *Biedman vs. Goodell, supra,* and cases cited; *Davenport S. F. & Loan Association vs. The North American Fire Insurance Co.,* 16 Iowa, 74. This principle, however, does not apply when the agent is duly appointed and vested with special or limited powers. "Whatever he does in such case beyond his authority, is void unless ratified, and that, without affecting the validity of what was done within the scope of his powers." *Davenport S. F. & L. Association vs. N. A. Fire Ins. Co., supra.*

The doctrines which we have above announced apply to the claim of the plaintiff that he should be subrogated to the rights of the mortgagee, and have a first lien upon the mortgaged premises for the one hundred dollars which he paid upon the judgment. Huff & Reed had no authority to assign the mortgage to the plaintiff, and such assignment does not bind the defendants. The plaintiff, in our opinion, is not entitled to the relief asked, and his petition should have been dismissed.

10 Reversed.

(12 ALLEN, 493.)

COMBS vs. SCOTT.

(Supreme Judicial Court of Massachusetts, September, 1866.)

Contract, brought to recover the price agreed to be paid to the plaintiff for his services in obtaining recruits for the U. S. military service. Plaintiff claimed to have been employed by one Dunton as the agent of defendants, and insisted that if there was no evidence of Dunton's authority to employ him, his employment had been ratified by the defendants. Verdict for plaintiff. Defendants allege exceptions.

C. Allen (W. Griswold and *S. T. Field,* with him), for defendants.

D. Aiken, for plaintiff.

BIGELOW, C. J. (After overruling defendant's exceptions upon other points.) But, upon another point, we are of opinion that the exceptions of the defendants are well taken. In instructing the jury on the question of ratification by the defendants of the contract alleged to have been made by their agent in excess of the authority granted to him, the judge in effect told the jury that such ratification would be binding on the defendants, though made under a material apprehension of facts, if such misapprehension arose from the negligence or omission of the defendants to make inquiries relative to the subject matter. In the broad and general form in which this instruction was given, we are of opinion that it did not correctly state the rule of law, and that the jury may have been misled by it in the consideration of this part of the case.

The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instructions given to the jury in the present case. Nor

after considerable research, have we been able to find that such qualification has ever been recognized in any approved text writer or adjudicated case; and upon consideration, it seems to us to be inconsistent with sound principle.

Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it.

The true doctrine is well stated by a learned text writer: "If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it." 1 Livermore on Agency, 44. See, also, Paley on Agency, 171, note *o*. Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger.

We do not mean to say that a person can be willfully ignorant or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding, where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them. The mistake at the trial consisted in the assumption that any such diligence was required of the defendants. On this point, the instructions

were stated in a manner which may have led the jury to misunderstand the rights and obligations of the parties.

Exceptions sustained.

NOTE—See, also, *Hyatt vs. Clark*, (118 N. Y. 565) *post.* p. — and note.

(86 NEW YORK, 200.)

SCOTT vs. MIDDLETOWN, UNIONVILLE & WATER-GAP RAILROAD COMPANY.

(New York Court of Appeals, October, 1881.)

Action to recover the purchase price of a quantity of iron rails, spikes, bolts, etc., alleged to have been sold and delivered by one Culver to defendant. It appeared that the materials in question were delivered to the defendant in pursuance of a contract made by Culver with the then president of defendant; that they were delivered to defendant and used for the purpose of laying the track on an extension of defendant's road. The defense was that the president had no authority to make the purchase. Plaintiff recovered and defendant appealed.

Lewis E. Carr, for appellant.

J. W. Culver, for respondent.

FINCH, J. That the president of the defendant corporation had no authority derived from his official position to incur the liability sought to be enforced, and that no express and formal action by the board of directors conferring such authority was shown, was conceded in the charge of the court to the jury, and in the approval of that charge by the General Term. By both tribunals the plaintiff's right of recovery was put upon the ground that the iron bought by the president was used in an extension of the company's track, without protest or dissent from the board of directors, who acquiesced in, and thereby ratified the original purchase.

The general rule is not here disputed, but the contention is that such ratification could not occur without knowledge by the directors of the terms of the contract, or, at least, of the fact that the purchase was upon the credit of the corporation. But there

were no terms of the contract except what the law implies from the acceptance of the property sold, which is, that the vendee will pay the value. There was nothing else to know; no other fact remained; the only terms of the contract were those implied by the law, which the defendant was bound to know. The more plausible suggestion which, perhaps, to some extent, involves the other is, that the vendee who ratifies, only does so when his use of the purchased article is with knowledge that it was bought on his credit. But it is difficult to see how we can avoid assuming that the company had such knowledge or, at least, how a jury could resist such natural and necessary inference, There is the iron, being laid in the company's track and appropriated to the company's use. What must a director, looking on, necessarily understand? Evidently, that such iron is sold to the corporation, or given to it or loaned for its use. The supposition of a gift or loan would be so unlikely and improbable, in the absence of any such actually existing fact, that he could hardly avoid understanding a sale to the company upon its credit. The fact of the delivery of the iron and its appropriation and use by the corporation for its proper and ordinary purposes with his knowledge and assent is some evidence that the directors knew of its sale to the company, and justifies such inference by the jury, especially in case where there is proof of a sale in fact intended, and no shadow of evidence of either a loan or a gift.

It is urged, however, that such directors might, under peculiar circumstances, have the right to suppose that the iron was furnished upon the credit of some other person or corporation, and that such peculiar circumstances existed in the present case. Still, if there was no gift or loan, the suggestion only changes the inference as to who is the vendor entitled to receive payment, and not the inference that he who appropriates and uses the property does so with the knowledge that he must pay its fair value to the real owner. The circumstances relied upon as justifying the supposition were also shown to have occurred after the delivery and acceptance of the iron, and so could not have affected the inference to be drawn. The lease to the Oswego Midland, by which that company assumed the funded and floating debt of the defendant, was dated May 24, 1871, and finally executed on the 30th of that month. The plaintiffs swear that all the iron was delivered before the execution of that lease. In any point of view, therefore, there was evidence

in the case tending to prove a ratification and which warranted such a conclusion by the jury.

These views indicate the grounds of our opinion that the motion for a non-suit was properly denied, and that the court correctly charged that if the defendant received the property bought by its president, and converted it to the use of the corporation, and used it for the corporate purposes for which the material was designed, that would be an adoption and ratification of the act of the officer, and that the directors using the materials purchased were bound to inquire and presumed to know whether it was paid for or not, and also that the court properly declined to charge that it was essential to an adoption of the act of the officer that the directors should know the terms of his contract. * * *

Affirmed.

(44 MICH. 519, 38 AM. REP. 278.)

EBERTS vs. SELOVER.

(Supreme Court of Michigan, October, 1880.)

Assumpsit. Plaintiff brings error. The opinion states the case.

Hiram Kimball, for plaintiff.

John R. Champion, for defendant.

COOLEY, J. This is an action brought to recover the subscription price of a local history. The subscription was obtained by an agent of the plaintiffs, and defendant signed his name to a promise to pay ten dollars on the delivery of the book. This promise was printed in a little book, made use of for the purpose of obtaining such subscriptions, and on the opposite page, in sight of one signing, was a reference to "rules to agents," printed on the first page of the book. One of these rules was that "no promise or statement made by an agent which interferes with the intent of printed contract shall be valid," and patrons were warned under no circumstances to permit themselves to be persuaded into signing the subscription unless they expected to pay the price charged. From the evidence it appears that when Schenck, the agent, solicited his subscription the defendant was not inclined to give it, but finally told the agent he would take it provided his fees in the office of justice,

then held by him, which should accrue from that time to the delivery of the book should be received as an equivalent. The agent assented, and defendant signed the subscription, receiving at the same time from the agent the following paper:

"COLDWATER, April 29, 1878.

"Mr. Isaac M. Selover gives his order for one copy of our history, for which he agrees to pay on delivery all the proceeds of his office as justice from now till the delivery of said history.

"EBERTS & ABBOTT, PER SCHENCK."

The plaintiffs claim that the history was duly delivered, and they demanded the subscription price, repudiating the undertaking of the agent to receive anything else, as being in excess of his authority and void. The defendant relies on that undertaking, and has brought into court $4.27 as the amount of his fees as justice for the period named. This statement of facts presents the questions at issue so far as they concern the merits.

It may be perfectly true, as the plaintiffs insist, that this undertaking of the agent was in excess of his authority; that the defendant was fairly notified by the entries in the book of that fact, and that consequently the plaintiffs were not bound by it, unless they subsequently ratified it. Unfortunately for their case, the determination that the act of the agent in giving this paper was void does not by any means settle the fact of defendant's liability upon the subscription.

The plaintiffs' case requires that they shall make out a contract for the purchase of their book. To do this, it is essential that they show that the minds of the parties met on some distinct and definite terms. The subscription standing alone shows this, for it shows, apparently, that defendant agreed to take the book and pay therefor on delivery the sum of ten dollars. But the contemporaneous paper given back by the agent constitutes a part of the same contract, and the two must be taken and considered together. *Bronson vs. Green,* Walk. Ch. 56; *Dudgeon vs. Haggart,* 17 Mich. 275. Taking the two together it appears that the defendant never assented to any purchase except upon the terms that the plaintiffs should accept his justice's fees for the period named in full payment for the book. If this part of the agreement is void, the whole falls to the ground, for defendant has assented to none of which this is not a part. When plaintiffs discovered what their agent had done, two courses were open to them: to ratify his contract, or to repudiate it. If they ratified it, they must accept what

he agreed to take. If they repudiated it, they must decline to deliver the book under it. But they cannot ratify so far as it favors them and repudiate, so far as it does not accord with their interests. They must deal with the defendant's undertaking as a whole, and cannot make a new contract by a selection of stipulations to which separately he has never assented.

The judgment must be affirmed with costs.

NOTE—In *Brigham vs. Palmer*. (1862) 3 Allen, (Mass.) 450, plaintiff's agent was authorized to sell a wagon for $75 cash, but sold it for part cash, another wagon and a note payable to the agent. Plaintiff sued as for goods sold and delivered. *Held*, that the action could not be maintained. "It seems to us very clear," said the court, "that if the plaintiff's property was sold by a person assuming to act for him, but without authority, in an action against the purchaser, if the plaintiff waives the tort and ratifies the contract, he must ratify it as the agent made it. Otherwise, he can only sue for the property itself, or in tort for damages for the unlawful conversion. He cannot ratify a part of the contract made on his behalf, and repudiate the rest."

(144 PENNSYLVANIA STATE, 398, 27 AM. ST. REP. 638.)

WHEELER & WILSON MFG. CO. vs. AUGHEY.

(Supreme Court of Pennsylvania, October, 1891.)

Action on four notes signed by defendant, who alleged that he was induced to sign them by false representations made to him by one Landis, agent for the plaintiff company. Landis falsely represented that he was not indebted to said company, that the notes were desired by it as collateral security for certain sewing-machines to be furnished by it to Landis, who was defendant's nephew. The machines were not furnished, and the notes were used by the company to secure a prior indebtedness of Landis for machines previously furnished him by said company. Judgment for defendant, and plaintiff appealed.

F. M. M. Pennell, John M. Gest, John Sparhawk, Jr., and *Atkinson*, for the appellant.

Alfred J. Patterson, J. Howard Neely, and *Jeremiah Lyons*, for the appellee.

GREEN, J. The learned court below distinctly charged the jury that if the notes in suit were given for a past indebtedness of Landis

to the plaintiff, their verdict should be in favor of the plaintiff; but if they found that they were given for machines to be furnished thereafter, and the machines were not delivered, the verdict should be for the defendant. The jury found for the defendant, and thereby determined that the notes were given for machines to be furnished in the future. There was abundant testimony in support of the defendant's contention, and we must therefore regard it as an established fact that the notes were given in consideration that machines should be delivered to Landis by the plaintiff subsequently to the execution and delivery of the notes in question. It is beyond all question that Landis obtained the signature of the defendant to the notes, and that he delivered the notes so signed to the plaintiffs, who received and kept them, and affirmed their title to them by bringing suit upon them against the defendant.

For the purpose of obtaining the notes, Landis most certainly acted as the representative of the plaintiffs, and they conclusively accepted the fruits of his act. That they cannot do this without being subject to the conditions upon which he obtained the notes, whether he had authority or not to make or agree to those conditions, is too well settled to admit of any doubt.

The whole doctrine was well expressed by SHARSWOOD, J., in the case of *Mundorff vs. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531: "If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum sentire debet et onus.* The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere.*"

This doctrine is so reasonable and so entirely just and right in every aspect in which it may be considered, and it has been enforced by the courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question.

It is of no avail to raise or discuss the question of the means of

proof of the agent's authority. The very essence of the rule is, that the agent had no authority to make the representation, condition, or stipulation, by means of which he obtained the property, or right of action of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act.

It is useless, therefore, to enquire whether there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person; and in all that class of cases, it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Mr. Justice SHARSWOOD, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: "Many of these cases are put upon an implied authority, but the more reasonable ground as it seems to me, is that the party having enjoyed a benefit must take it *cum onere*."

We are of opinion that the learned court below was entirely right in the treatment of this case.

Judgment affirmed in each of these cases.

(36 NEW YORK, 79.)

SMITH vs. TRACY.

(New York Court of Appeals, January, 1867.)

Action for breach of warranty on a sale of bank stock. Tracy owned $28,000 of stock in the Hollister Bank of Buffalo. He authorized the president, Hollister, to sell it at par with interest

from the date of the preceding August dividend, and executed the proper assignments leaving blanks for the name of the purchaser. Hollister sold $10,000 worth to Smith, representing, what he believed to be true, that the bank was solvent and that the investment would be a good one. Tracy received the pay for the stock from Hollister who sold the residue to other persons. Tracy knew nothing of Hollister's representations, though he believed the bank to be in good condition. It soon afterwards failed, its capital having been impaired at the time of the sale, and the stockholders were subjected to heavy personal liability. Tracy having died, the action was against his executor. Verdict for plaintiff and defendant appealed.

John Ganson, for appellant.

Chauncey Tucker, for respondent.

PORTER, J. We concur with the court below in the opinion that Hollister had no authority to warrant the stock, which his principal empowered him merely to sell. The rule applicable to such a case is stated with discrimination and accuracy in our leading textbook on the law of contracts: "An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty." (1 Parsons on Contracts, 5th ed,, 60.) It was proved that no such custom exists in connection with the sale of bank stocks, and that the special agent, in this instance, had nothing but a naked authority to sell.

We also concur in the conclusion of the able and learned judge, who delivered the prevailing opinion, that there was not a ratification of the contract by the principal with knowledge of the unauthorized act of the agent. No fraud is imputed by the plaintiff, either to the agent or the principal. He sued the executor on a contract which the testator did not make, and he took upon himself the burden of showing that another had power to make it for him. As the testator was chargeable with no negligence or wrong, and as he did nothing at any time to mislead the plaintiff or the public, or to accredit Hollister as empowered to make general engagements in his behalf, the only mode of connecting him with the warranty was by showing that he authorized it before it was given, or that he assented to it afterward. He did neither, but lived and died in utter ignorance that such a contract had ever been made.

The recovery was obtained on the theory that the warranty was

within the terms of the authority. It was sustained by a divided court on the theory that although the testator neither authorized nor assented to the contract, and never knew of its existence, his act of receiving the proceeds of an authorized sale of his own property, estopped his executor from denying the collateral engagement, unlawfully entered into by another in his name. We think this view cannot be maintained. It is founded upon a misapprehension of the principles, settled by a series of decisions in a class of cases to which this does not belong. When a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the contract or the wrong. The courts, however, have been careful in the leading cases of that class, to note, as the precise ground of legal liability, the knowledge of the facts by the party appropriating the benefit. (*Murray vs. Binninger*, 36 N. Y. 61; *Fitzhugh vs. Sackett*, Id.; *Bank of Beloit vs. Beale*, 34 Id. 473, 475; *Keeler vs. Salisbury*, 33 Id. 653; *Farmers' Loan & Trust Co. vs. Walworth*, 1 Id. 446; *Palmerston vs. Huxford*, 4 Denio, 166, 168.) So, when a party takes the benefit of an unauthorized loan on purchase, obtained on his credit by his known servant or employé, it is held that his subsequent adoption of the transaction is equivalent to an original authority. (*Bolton vs. Hillersden*, 1 Ld. Raym., 224; *Precious vs. Abel*, 1 Esp. 350; *Rimell vs. Sampayo*, 1 Carr. & Payne, 254.) The cases on which the respondent mainly relies, are those in which it has been held, that when an authorized agent, acting within the scope of his authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for his own wrong. (*Bennett vs. Judson*, 21 N. Y. 238; *Elwell vs. Chamberlain*, 31 Id. 611.)

These authorities rest upon the principle, that when a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit, was practiced by him or by his accredited agent. In such a case he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained.

But when, as in the present case, there is a mere special authority to sell particular property, of a kind not usually sold with warranty, the buyer, who alleges a warranty by the agent, must show that the engagement was one he was empowered to make in behalf of his principal. The receipt of the proceeds of the sale, in ignorance of any such undertaking, is neither an assent to the breach of duty nor an extension of the authority of the agent. The question is one as to the existence and extent of the power, and not as to a fraud practiced by an agent acting within the scope of his authority.

The distinction between the different classes of cases, to which we have referred, is sharply defined in two leading decisions, both made by the same judges and at the same term of court. (*Bennett vs. Judson*, 21 N. Y. 238; *Condit vs. Baldwin*, Id. 219, 224, 225, 78 Am. Dec. 137.) In *Bennett vs. Judson*, the defendant employed an agent to negotiate sales of his western lands. The latter effected a sale by making representations as to the quality and location of the land, which proved to be grossly untrue. The principal, who received and retained the price, was prosecuted by the vendee for the fraud, and he insisted, by way of defense, that, though he authorized his agent to negotiate the sale, he did not instruct him to cheat the purchaser; that the statements ought not to be imputed to him, for he did not make them personally; and that they could not be deemed fraudulent, for when they were made, neither he nor the agent knew whether they were true or false. The court held, that the principal could not claim immunity on the ground that the fraud was perpetrated through the instrumentality of his agent, and that a material misstatement, made by one who neither knows nor believes it to be true, is just as much a fraud on the party with whom he deals as if he knew it to be false.

In *Condit vs. Baldwin*, the doctrine of involuntary ratification was sought to be extended to a case where the element of fraud was wanting, and where the principal, without knowledge of the facts, had received the fruits of a transaction, in which the special agent had exceeded the limits of his actual and apparent authority. The court held that, under such circumstances, the application of the rule recognized in the case of *Bennett vs. Judson* would be inappropriate and unwarranted. The question arose on a defense of usury. The plaintiff had intrusted money to a special agent for investment. The latter lent it in the name of his principal, but transcended his

power by contraction with the borrower for the payment of a bonus on the amount. The plaintiff, in ignorance of this, received the security taken for the loan, and was met, in an action afterwards brought to enforce it, with the defense, that, by accepting it, she had adopted the unknown and unauthorized act of the agent. The opinion of the court was delivered by the present chief judge, who aptly illustrated the distinction to which we have alluded, by a reference to the leading cases of *Wilson vs. Tumman* and *Bush vs. Buckingham.* "Where a landlord authorized a bailiff to distrain for rent due from his tenant, directing him not to take anything except on the demised premises, and the bailiff distrained cattle of another, supposing them to be the tenant's, beyond the boundary of the farm, and the cattle thus taken were sold, and the landlord received the proceeds, the landlord was held not to be liable in trover for the value of the cattle, unless it was found that he ratified the act of the bailiff with knowledge of the irregularity, or chose without inquiry to take the risk upon himself and to adopt the whole act; and it was also held that by adopting and ratifying what he had authorized, he did not adopt and ratify the unauthorized acts of his agent."

In *Bush vs. Buckingham* (2 Vent., 83), the plaintiff made a loan of fifty pounds at a legal rate of interest. She referred the borrower to her scrivener, who would draw the bond to secure the loan; and the scrivener, in error and against her will, included therein more than lawful interest. In a suit on the bond, the defendant interposed the defense of usury, but it was overruled, as there was no intent on her part, to take or receive more than lawful interest; and it was held that by commencing suit on the bond, she did not ratify the act of her agent in providing for the payment of more than legal interest, but that she might recover the amount loaned with lawful interest. (21 N. Y., 225, 226.)

The doctrine of the case of *Bennett vs. Judson,* in its legitimate application to frauds perpetrated through an agent, acting within the scope of his power, was afterwards reaffirmed in *Elwell vs. Chamberlain* (31 N. Y., 611). The rule announced in *Condit vs. Baldwin,* has since been recognized as that appropriate to a case, where the question arises on the authority of the agent to enter into a collateral contract in behalf of his principal. *Bell vs. Day,* 32 N. Y., 165, 178.) There is no antagonism between the two classes of cases; and the distinction between the subjects to which

they are respectively applicable and the principles on which they rest, is overlooked by those who suppose these decisions to be inharmonious.

In the case before us, it is claimed that the receipt by the testator of the proceeds of an authorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited power and occupying strictly fiduciary relations. (*Owings vs. Hull*, 9 Peters, 608, 629; *Bell vs. Cunningham*, 3 Id., 69, 76, 81; *Brady v. Todd*, 99 Eng. Com. Law, 591, 601, 605; *Freeman vs. Rosher*, 66 Id., 787; *Seymour vs. Wyckoff*, 10 N. Y., 213.) In the language of Judge STORY, in the first of these cases, "no doctrine is better settled, both upon principle and authority than this; that the ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts."

The plaintiff is chargeable with notice of the extent and limits of the power of the special agent from whom he purchased. (*Nixon vs. Palmer*, 4 Seld. 398; *Sage vs. Sherman*, Lalor's Supp., 147, 152; *Beals vs. Allen*, 18 Johns, 363, 366, 9 Am. Dec. 221.) He knew that Hollister was not the owner of the stock he assumed to sell; and he was content to take a warranty from one, who had neither actual nor apparent authority to bind his principal by such an engagement. It was a single and isolated transaction, unaided by any extrinsic fact or any antecedent relation; and upon its own merits it must stand or fall. The sole authority of Hollister was to sell the stock at par, with interest from the date of the last dividend, and to insert the name of the purchaser in the blank, left in the body of the transfer written and signed by Mr. Tracy. The representations to the plaintiff were not even made in the testator's name; and the purchaser who assumed the risk of bargaining without inquiry, cannot transfer to the defendant, a loss resulting from his own neglect and incaution.

The judgment should be reversed and a new trial ordered with costs to abide the event.

(18 WALLACE, 332.)

COOK vs. TULLIS.

(Supreme Court of the United States, October, 1873.)

Cook and others, who were trustees in bankruptcy of one Homans, filed a bill in equity to set aside the transfer of a certain note for $7,000 secured by mortgage, alleged to have been made by Homans to defendant Tullis in violation of the bankrupt act, on the ground that it was made for the purpose of giving Tullis a preference over other creditors.

Homans had been a banker and had frequently purchased United States bonds for Tullis, and these bonds had been left in Homans' possession for safe keeping, in a separate package marked with Tullis' name. On one occasion Tullis had permitted Homans to use $20,000 worth of these bonds, on the latter's depositing in the package negotiable paper of like amount until the bonds were returned. Afterwards, and in March, 1869, Homans took, without permission, $6,000 of the bonds, depositing bills receivable in their place, and in April following he took out these bills receivable and substituted a note and mortgage of $7,000 belonging to him, made by one Hardesty, dated April 17, 1869, and payable in 90 days. This note and mortgage not being paid, Homans removed them from the package and placed them in the hands of his attorneys, with instructions to give notice that if not paid suit would be begun. Afterwards, and on August 26, 1869, Homans failed.

Tullis was soon afterwards informed of the substitution of the note and mortgage for his bonds, and signified his acceptance of them, and gave instructions to the attorneys to foreclose the mortgage. On the day of his failure, also, Homans informed the attorneys that $6,000 of the proceeds of the note and mortgage belonged to Tullis, and directed them to account to him for that sum. Tullis had no notice that Homans was insolvent until the day of his failure, and Homans testified that at the time he took the bonds he did not comtemplate insolvency, and that he supposed Tullis would not object so long as he was secured. Homans was adjudged a bankrupt on September 20, 1869, on a petition filed September 13, and in December complainants were appointed trustees. Other facts appear in the opinion.

The court below adjudged that defendant was entitled to $6,000

of the proceeds of the note and mortgage, and complainants to the residue. Complainants appealed.

George Hoadly and *E. M. Johnson,* for appellant.

H. A. Morrill, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows: (after deciding that the transaction did not present a case of preference made by a bankrupt to one creditor over another, within the meaning of the Bankrupt Act.)

This suit must proceed, therefore, if at all, not on the ground of an alleged preference to a creditor, in violation of the Bankrupt Act, but upon the ground that the title to the note and mortgage never passed from the bankrupt, because the ratification of his unauthorized transaction was not made until after the period when the rights of the trustees attached; or on the ground that the note and mortgage never became subject in the hands of the bankrupt to the claim of the defendant as the investment of the latter's property, because the bonds appropriated were not first sold and their proceeds used in the purchase of the note and mortgage.

Both of these grounds were urged by counsel of the appellants and it is on their disposition that the case must be determined.

The substitution of the note and mortgage in the place of the bonds was approved by the defendant immediately upon being made acquainted with the facts. This approval constituted a ratification of the transaction. The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former, is well settled.

The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made. As said in one of the cases cited by counsel, "the ratification is the first proceeding by which he (the principal ratifying) becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a

position to enter directly upon a similar transaction himself. Thus, if an individual pretending to be the agent of another should enter into a contract for the sale of land of his assumed principal, it would be impossible for the latter to ratify the contract if, between its date and the attempted ratification, he had himself disposed of the property. He could not defeat the intermediate sale made by himself and impart validity to the sale made by the pretended agent, for his power over the property or to contract for its sale would be gone." *McCracken vs. City of San Francisco,* 16 Cal. 624; *ante,* ——. On the same principle, liens by attachment or judgment upon the property of a debtor are not affected by his subsequent ratification of a previous unauthorized transfer of the property. *Taylor vs. Robinson,* 14 California, 396; *Wood vs. McCain,* 7 Alabama, 806, 42 Am. Dec. 612; *Bird vs. Brown,* 4 Exchequer, 799.

The question, therefore, in this case is whether any rights of third parties did thus intervene between the act of substitution made by Homans and its adoption and ratification by Tullis, which defeated the retroactive efficacy of the ratification. And the test is, as already indicated, could the parties have made the transaction at the time of the ratification without contravening the provisions of the Bankrupt Act?

It is asserted by the appellants that the rights of the trustees extend not only to all property of the bankrupt in his possession when proceedings in bankruptcy were instituted against him, but also to all property transferred by the bankrupt within four months previously to a creditor in order to give him a preference over other creditors, or transferred by the bankrupt within six months previously to any one to defeat or evade the operation of the Bankrupt Act, the grantee in both cases knowing, or having reasonable cause to believe, that the grantor was, at the time, insolvent or that he then contemplated insolvency. Admitting this to be so, it does not follow that the trustees acquired any right to the note and mortgage in question. They were not transferred to the defendant, as already stated, to give a preference to one creditor of the bankrupt over another, for the defendant was not a creditor of Homans at the time, nor were they transferred to him to evade or defeat any of the provisions of the Bankrupt Act; the transaction was neither designed nor calculated to have any such effect. Homans was not insolvent at the

time, nor did he contemplate insolvency. But even if he had been then insolvent, the transaction would not have been the subject of just complaint on the part of his creditors, if made with the approval of the defendant whose bonds were taken. There is no pretence that the property substituted was not equally valuable with that taken, or that the estate of the bankrupt was any the less available to his creditors. A fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously.

We do not think, therefore, that the rights of the trustees, though relating back four months so as to avoid preferences to creditors, and six months to avoid transfers to others, in fraud of the act, and thus going back of the ratification, touched the transaction in question or prevented the ratification from having complete retroactive efficacy.

The position of counsel, that the ratification, if sustained, only extended to the conversion of the bonds, and merely operated to deprive the transaction of its tortious aspect, all else consisting of dealings by Homans with his own property, is not tenable. The answer to it is, that the ratification was of the whole transaction taken together; that of appropriation of the bonds upon substituting and equivalent in value for them, not of a part without the rest, not of the appropriation without the substitution. * * *

But if we lay aside the doctrine of ratification as inapplicable, and assume that the transaction could not have been made by the parties after the failure of Homans, and, therefore, that the previous substitution could not then have been ratified, and treat the cause as one of simple misappropriation of property of the defendant, still the trustees must fail in their suit. They took the property of the bankrupt subject to all legal and equitable

claims of others. They were affected by all the equities which could be urged against him. Now, it is a rule of equity jurisprudence, perfectly well settled and of universal application, that where property held upon any trust to keep, or use, or invest it in any particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or *cestui que trust.*

In the case of Taylor, assignee of a bankrupt, against Plumber, 3 Maule & Selwyn, 562, this doctrine is well illustrated. There a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with them, and did abscond, but was taken before he quitted England. Thereupon he surrendered the stock and bullion to his principal, who sold the whole and received the proceeds. The broker became bankrupt on the day he received and misapplied the money, and his assignees sued for the proceeds of the stock and bullion. But the court decided that the principal was entitled to the proceeds as against the assignees, holding that if the property in its original state and form is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust and give to the trustee, or those who represent him in right, any more valid claim in respect to it than he previously had; and that it makes no difference in reason or law into what other form, different from the original, the change may have been made, for the product of, or substitution for, the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and that the right only ceases when the means of ascertainment fail.

It is contended that the doctrine of this case does not apply because the note and mortgage were not purchased with the proceeds of the bonds taken, but were substituted for them. We do dot think this fact takes the present case from the principle upon which the other proceeds, that property acquired by a wrongful appropriation of other property covered by a trust, is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property

in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner or the *cestui que trust,* and assignees and trustees in bankruptcy can acquire no interest in the property in its changed form which will defeat his rights in a court of equity.

Decree affirmed.

(28 VERMONT, 338.)

WOODWARD vs. HARLOW.

(Supreme Court of Vermont, February, 1856.)

Action of book account. While Woodward was dangerously sick and bereft of reason, Harlow sued him and attached his property as for a debt due him from Woodward, though in fact Woodward did not then owe him anything. Reuben Marks, who was Woodward's partner in business, in order to secure the release of Woodward's property, let Harlow have five notes belonging to Woodward as security, taking the receipt mentioned in the opinion. This was done without Woodward's knowledge or authority. When Woodward recovered, he disapproved of Marks' act and demanded back the notes, which Harlow refused to return. Woodward then brought this action to recover of Harlow the amount of two of the notes which he had collected, and also the value of the other three. The court below allowed him to recover the amount collected, but disallowed his claim as to the other three notes.

F. Potter, for plaintiff.

S. H. Hodges, for defendant.

BENNETT, J. The questions arise in this case upon an auditor's report, in an action on book; and the plaintiff claims to be allowed for three certain notes, which went into the defendant's hands upon the terms specified by the auditor, and which had not been collected at the time of the audit, and which were disallowed by the county court. No question is raised, except as to the uncollected notes; and we are to inquire whether, upon the facts reported, an action of account, at common law, would lie to recover the amount of these notes. On the 26th day of September, 1853, the defendant gave to one Reuben Marks his receipt for five notes, including the three in question, to hold the same, or collect, as

security for the plaintiff's account, due to the defendant; and it is added in the receipt, that the defendant is to hold the notes or money until the plaintiff's account is settled, and then he is to account to the plaintiff for them, after the costs of the suit then pending had been paid. The case shows that when Marks turned out these notes to the defendant, Woodward was not in his right mind, and that he had no authority to do it from Woodward; and it is found that, in point of fact, the plaintiff was not indebted to the defendant. Woodward never was satisfied with the action of Marks, and he demanded the notes of the defendant, and required him to settle on account of them, and this, the report says, the defendant declined to do, except upon the terms of the receipt.

No doubt, when notes go into the hands of a bailiff or receiver under a contract, he may be called to an account, in the common law action; but the defendant insists he was a tort feazor as against the plaintiff, in getting the possession of these notes by the way of marks.

Suppose it be so, could not the plaintiff affirm the contract made by Marks, on his account, with the defendant? We think he may; and by bringing his action on book, and claiming an allowance for these, he has adopted and confirmed the acts of Marks; and it is not for the defendant to insist that the taking and holding the notes was tortious on his part. This form of action can only be maintained on the ground of a ratification. See Story on Agency, sec. 259. It is of no consequence that the plaintiff at first disapproved of the acts of Marks. This could not have the effect to prevent a subsequent ratification of the acts. His disapproval of the acts of Marks was at any time countermandable, and cannot have the effect by way of estoppel or otherwise, to conclude the plaintiff from a subsequent adoption of the assumed agency.

It is true, as held in *Smith vs. Hodson*, 4 Term, 211, that if he adopts a part he must adopt the entire contract. But it is found that nothing was due from the plaintiff to the defendant; and if the defendant had a claim for costs in the action then pending, he might have charged them in his account, and had them adjusted in the present action. The expression in the receipt, that the defendant is to account, "after the costs of suit have been paid," does not make the payment of such costs a condition precedent to the right of bringing an action, but may give to the defendant a right of retainer to an amount equal to such costs.

Adopting the whole contract then, as expressed in the receipt,

we think there is nothing to conclude this action. We think the defendant may well be sued in an action of account as at common law for the notes; and by the statute of 1852, a recovery can be had for those items in the plaintiff's account in the action on book.

The judgment of the county court is reversed, and judgment for plaintiff, including in the damages the three notes uncollected at the time of the audit and the interest.

V.

WHAT AMOUNTS TO A RATIFICATION.

(110 MISSOURI, 546.)

HAWKINS vs. McGROARTY.

(Supreme Court of Missouri, April, 1892.)

Action to enforce specific performance of a contract. Opinion states the facts.

Gibson, Bond & Gibson, for appellants.

W. P. Macklin & W. S. Bodley, for respondents.

BRACE, J. By an act approved March 19, 1887, the statute of "frauds and perjuries," section 2513, Revised Statutes, 1879, was amended by adding the following clause to that section: "And no contract for the sale of lands made by an agent shall be binding upon the principal unless such an agent is authorized in writing to make said contract." This is an action in the nature of a bill in equity to specifically enforce the written contract of an agent in the name of his principal for a sale of land made by the agent, not within the terms of such agent's written authority, upon the ground of a verbal ratification of such sale by the principal after he was informed thereof. In the facts of the case there is no element of equitable estoppel. Plaintiff's evidence tended at most only to prove that the defendant, when informed by letter of the sale, did not manifest to the agent any disapprobation thereof, but directly thereafter sold to another person.

The trial court ruled that the written authority must authorize the agent to make the contract which he does make, in order to

bind the principal, and unless it does so the ratification thereof must be in writing to bind him, citing Story on Agency (9 ed.) sec. 242, and *Dis atch Line vs. Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203, in which it was held that "a ratification of an act done by one assuming to be an agent relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification except in the same manner."

At common law, where a contract is required to be under seal, a ratification must also be under seal. I American & English Encyclopedia of Law, 436; Story on Agency, sec. 49, and authorities in note 3; Mechem on Agency, sec. 137, and authorities note 6, same page. And upon the same principle the last author, stating the general rule, says, "If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear." Sec. 136.

In *Pollard & Co. vs. Gibbs*, 55 Ga. 45, it was held that "where a crop lien for fertilizers is executed by an agent who acts without authority from the principal, and in his absence, and the lien is under seal, proof of the ratification by the principal must be in writing and under seal."

In *Ragan vs. Chenault*, 78 Ky. 546, under a statute which provided that "no person shall be bound as the surety of another by the act of an agent, unless the authority of the agent is in writing, signed by the principal," it was held that subsequent verbal ratification would not bind the surety; that to so hold would be to defeat the object of the statute.

In *Palmer vs. Williams*, 24 Mich. 328, under a statute of frauds, the same as our own, before the adoption of the amendment set out, it was held that "ratification, if not made in writing, with due knowledge of the circumstances, could only be made out by such conduct on the part of the principal as would equitably estop him from insisting on his rights. And such an estoppel would not be made out unless defendants had been so far misled by him to their own prejudice, that justice demanded their protection against him. * * * In the absence of any conduct designed or calculated to mislead, mere delay will not deprive an owner of his estate, legal or equitable, until barred by some clear rule of equity."

There is no such bar in the facts of this case. Hiemans was author-

ized in writing by the defendant Maull to sell his property for $1,400. On the ninth of July he sold to plaintiff for $1,300, who paid Hiemans $40 earnest money, and received from him a receipt for that amount on account of the sale. Hiemans says he immediately wrote Maull a letter, and that Maull called the next day, when he explained the sale to him and he manifested no disapprobation. Maull sold to his co-defendant, McGroarty, on the evening of the eleventh. He testifies that he did not see Hiemans until after this sale, and did not receive his letter until the evening of the day he sold to McGroarty, and did not understand from its contents that his agent had actually effected a sale. However the truth of this matter may be, he never received from his agent the earnest money of the plaintiff; in a day or two, took the check he received from McGroarty for $50, paid by him as earnest money, to Hiemans (who collected it), and directed conveyances to be prepared to McGroarty, which was accordingly done, the balance of the purchase money paid, and the deeds delivered on the twenty-second of July. In the meantime he never, by any act or word of his, gave the plaintiff to understand for a moment that he had authorized or ratified the sale made by Hiemans to him; but from the first approach to him, made by the plaintiff, to secure a performance of the contract, steadily refused to recognize, ratify or confirm the same.

Under the statute, as it now reads, requiring written authority for the contract the agents make, there can be no question, it would seem, that there is no such ratification here as could, by any process of reasoning, bind the defendant Maull to specifically perform the contract in question, which his agent Hiemans had no written authority to make.

The judgment is affirmed. All concur.

NOTE—In *Adams vs. Power*, 52 Miss. 828, when the question was as to the ratification of a contract executed by an agent, one Shannon, and unnecessarily under seal, the court said: "The general rule of the common law is that an agent cannot bind his principal by a sealed instrument unless he has been appointed by a writing under seal. But the rule seems in this country to have been so far relaxed as to allow a subsequent ratification by acts of a contract under seal if the law does not require such instruments to be sealed. *Worrall vs. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Lawrence vs. Taylor*, 5 Hill, (N. Y.) 113; *Randall vs. Van Vechten*, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *Evans vs. Wells*, 22 Wend. (N. Y.) 340; Story on Ag. §§ 154, 160-162. The defeasance contract would have been as effectual without seal as with it. The statute of frauds does not require such agreements to be in writing under seal. The acceptance of the note, and the appropriation of it with knowledge of the circumstances and agreement with which

it was connected, was a ratification of the assumed agency of Shannon." To the same effect: *State vs. Spartansburg, etc., R. R. Co.*, 8 S. C. 129; *Hammond vs. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

But in *Pollard vs. Gibbs*, 55 Ga. 45, cited in the principal case, it is held, following *Rowe vs. Ware*, 30 Ga. 278, that even though the contract is unnecessarily under seal, still the ratification must be sufficient to authorize the contract "sealed as it is."

(11 GRAY, 102, 71 AM. DEC. 690.)

McINTYRE vs. PARK.

(Supreme Judicial Court of Massachusetts, September, 1858.)

Action of contract. Plaintiff entered into an agreement with defendants, D. W. Castle and D. S. Young, whereby he agreed to convey to them certain land and buildings thereon; they to pay him seven thousand eight hundred and fifty dollars, and in case either party made default, he should forfeit five hundred dollars, and pay the same to the other party. Defendants Castle and Young failed to pay, and refused to perform their part of the contract. On the trial, the plaintiff produced the agreement to which was Castle's name, signed by himself, and also the names of Park and Young, signed by Castle. Castle's authority to sign the names of Park and Young did not appear, and defendant objected to the introduction of the instrument as evidence. Plaintiff then offered evidence, against defendant's objection, that defendant was informed of Castle's use of his name; that he consented to be bound by the writing; that he treated it as a valid contract, and got from plaintiff an extension of time under it. Verdict for plaintiff, with damages fixed at three hundred and seventy-six dollars. Defendant alleged exceptions.

S. T. Spaulding, for the defendant.

C. Delano, for the plaintiff.

By court, METCALF, J. We express no opinion on the question whether the sum of five hundred dollars, mentioned in the agreement upon which this action is brought, is a penalty or liquidated damages.

That point was ruled in defendant's favor, and the plaintiff has not excepted to the ruling.

The evidence of the defendant's ratification or adoption of the agreement executed in his name was rightly admitted, and he, by such ratification or adoption, became answerable for a breach of that agreement: *Merrifield vs. Parritt,* 11 Cush. (Mass.) 590. In that case the agreement was not under seal; and the defendant contends that a sealed instrument, executed without previous authority, can be ratified only by an instrument under seal. However this may be elsewhere, by the law of Massachusetts such instrument may be ratified by parol: *Cady vs. Shepherd,* 11 Pick. (Mass.) 400, (22 Am. Dec. 379); *Swan vs. Steadman,* 4 Met. (Mass.) 548; see also 1 Am. Lead. Cases, 4th ed. 450; Collyer on Part. 3d Am. ed. sec. 467; Story on Agency, 5th ed. secs. 49, 51, 242, and notes; *McDonald vs. Eggleston,* 26 Vt. 154, 60 Am. Dec. 303. The cases in which this doctrine has been adjudged were those in which one partner, without the previous authority of his copartners, executed a deed in the name of the firm. But we do not perceive any reason for confining the doctrine to that class of cases.

We cannot see that the jury ought to have been instructed to find only nominal damages. It does not appear that all the evidence as to damages is set forth in the bill of exceptions. The instructions on the subject seem to us to have been right; and if the jury assessed larger damages than the evidence legally warranted, the defendants should have moved for a new trial on that ground. We must suppose, in this stage of the case, either that there was evidence of damages which is not reported, or that the jury judged from the nature of the case what was the amount of damages which the plaintiff had sustained—as they always do in those actions in which general damages only are claimed in the plaintiff's declaration, and in which the law has prescribed no fixed rule of damages.

All the other rulings and instructions to which exceptions have been alleged we think were correct; and we deem it unnecessary to do more than simply to affirm them.

Exception overruled.

(57 CONNECTICUT, 42, 14 AM. ST. REP. 83.)

SHONINGER vs. PEABODY.

(Supreme Court of Connecticut, January, 1889.)

Action of assumpsit, brought by Shoninger and another against Peabody, to recover for the price of a piano sold. The facts appear in the opinion. There was a judgment for the plaintiffs, and the defendant appealed.

J. O'Neil and *C. A. Colley,* for the appellant.

S. W. Kellogg and *J. P. Kellogg,* for the appellees.

LOOMIS, J. The plaintiffs have been for many years dealers in musical instruments at New Haven, with a branch store at Waterbury which, from 1880 to October, 1886, was under the sole charge and management of one Henry R. Day, the general agent of the plaintiffs. Day was paid a regular salary, and received, in addition, a commission on all sales made by him for the plaintiffs. While acting as such agent he sold from the store in Waterbury one of the plaintiffs' pianos to the defendant for the agreed price of three hundred dollars, which was agreed to be paid for wholly by certain commissions which might become due from Day to the defendant on future stock transactions between the defendant and Day on his private account. The defendant has been for a considerable time engaged in the business of a stock-broker, and as such had had previous dealings with Day. The plaintiffs had no actual knowledge of the sale of the piano until after Day had left their employment. He had reported to them that the piano was rented to the defendant.

But the finding is explicit that the plaintiffs were informed of the terms of the sale after Day left their employ, and before the bringing of this suit. The defendant earned commissions in his stock transactions on Day's account to the amount of $185, which were credited by Day on the piano account, but not paid over to the plaintiffs. In the year 1886 the defendant paid the plaintiffs several sums, aggregating seventy-five dollars, which is all the plaintiffs ever received towards the price of the piano. Day was a defaulter in his dealings with the plaintiffs to an amount exceeding five thousand dollars.

The manifest wrong and injustice perpetrated upon the plaintiffs

by the defendant and Day make us regret that the principles of law applicable to the remedy chosen by the plaintiffs are not flexible enough to afford relief. But the greatest good to the greatest number requires adherence to sound general principles, even though in a given case a party may fail to obtain redress. The whole trouble in this case arises from a mistake as to the plaintiffs' remedy.

When the plaintiffs were informed of the terms of the contract made by their agent for the sale of the piano to the defendant, they had an election to repudiate the arrangement, and by tendering back what they had received in ignorance of the terms of the sale, and demanding the piano, they could have recovered it by an action of replevin or obtained its value in trover. But, knowing the terms of the sale, they elected to sue in assumpsit on the contract for the agreed price, and thereby they affirmed the contract, and ratified the act of the agent, precisely as if it had been expressly approved upon being reported to them by the agent or the defendant. And in contemplation of law, a subsequent ratification and adoption of an act has relation back to the time of the act, and is tantamount to a prior command: 1 Am. Lead. Cas., 4th ed. 592.

The argument for the plaintiffs (though it is not so stated) seems really to involve the fallacious assumption that the plaintiffs could affirm the contract in part and repudiate it in part; that is, that the contract is to be treated as good for the agreed price, but bad as to the agreed mode of payment. But the law requires a contract to be affirmed or repudiated in its entirety. *Shepard vs. Palmer*, 6 Conn. 100; *Newell vs. Hurlburt*, 2 Vt. 351. See, also, the cases hereinafter cited.

There was no contract at all relative to the piano except the one made by Day as their agent; and when the plaintiffs, knowing the facts, sued on that contract, they affirmed it in every essential particular, both as to price and as to the terms of paying the price.

The leading case on this subject is *Smith vs. Hodson*, 4 Term Rep. 211, where it was held that if a bankrupt, on the eve of his bankruptcy, fraudulently delivered goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods in trover; but if they bring assumpsit, they affirm the contract with all its incidents, so that a creditor may even set off his debt; and the principle established in that case has ever since been considered to rest upon an impregnable foundation, that the existence of the contract could not be affirmed to promote the pur-

pose of a recovery, and at the same time be treated as a nullity in order to shut out the opposite party from a defense otherwise open to him.

In *Butler vs. Gable*, 1 Watts & S. 108, the trustees in a domestic attachment, which is a proceeding in the nature of a commission of bankruptcy, sued the defendant in assumpsit for the amount of a check, which had been transferred to him by the party against whom the attachment issued subsequently to its date, and relied on the invalidity of the transaction as ground of recovery. But it was held by the court that, whatever the result might have been had the action been laid in tort, the necessary result of laying it in contract was to affirm the transaction on which it was founded, and entitle the defendant to show that he had received the check in payment of a debt.

For the same reason, it has long been held that a principal who seeks to enforce a sale made by his agent cannot ordinarily allege that the agent exceeded his instructions in warranting the goods, because he must accept the contract as a whole if he means to rely on any portion.

The general concensus of judicial opinion in the United States is in perfect accord with the authorities cited from the English courts. We will select a few only of the numerous cases affirming the principles upon which we base our opinion.

One of the most recent cases is that of *Billings vs. Mason*, 80 Me. 496 (*post*, ——), decided in August, 1888. The case is stated by DANFORTH, J., in giving the opinion of the court as follows: "The action is assumpsit upon an account annexed. The defendant admits that he received from the plaintiff the goods charged, and makes no question as to the prices. This makes a *prima facie* case against him; and though technically it does not change the burden of proof, it devolves upon him, if he would avoid the responsibility, to give some reason why. The explanation offered by the defendant is, that though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element of which was that certain goods of a like kind, which the defendant then had, should be taken in payment. This agreement with the agent is not questioned, but the answer to it is two-fold: (1) that the agent had no authority to make such a contract; and (2) that the contract under which the action is sought to be maintained was made directly with the plaintiff, though in some degree through

the instrumentality of the agent. Assuming, under the first, that the agent had no authority to make the contract he did,—and the evidence is quite conclusive upon that point,—still it does not change the conceded fact that he not only assumed the authority to do so, but did actually make such a contract. Waiving for the moment the second point raised, this was the only contract having the assent of the defendant,—the contract under which he acted, and by virtue of which he obtained the goods. It is quite clear that the plaintiff cannot hold him upon a contract he did not make, or repudiate the contract in part, and hold the remainder valid. *Brigham vs. Palmer,* 3 Allen, 450. Nor can he be holden upon an implied contract, for that is excluded by the express."

In *Smith vs. Plummer,* 5 Whart. 89, 34 Am. Dec. 530, a contract made for the benefit of the defendants was held to have been ratified by their giving it in evidence as a defense in a suit brought contrary to its terms.

In *Beidman vs. Goodell,* 56 Iowa, 592, an agent for the owner of a note and mortgage took new notes for the debt, and in consideration of their being signed by the wife of the maker, who was not a party to the former note, agreed (without the authority of his principal) to cancel the mortgage. His principal, having brought a suit and taken judgment against the makers of the new notes, was held to have ratified the agreement, so that he could not enforce the mortgage, which at the time was improperly canceled.

In *Peninsular Bank vs. Hanmer,* 14 Mich. 208, a contract was entered into by the cashier in behalf of the bank, by which security was given by a debtor on long time to a creditor, in the interest and on motion and arrangement of the cashier, who, in order to procure the assent of the creditor, without authority from the bank, made and delivered a bond of indemnity against a prior mortgage on the property covered by the collateral security. The bank received the benefit of the transaction, and defended the creditor against a suit to foreclose a prior mortgage. It was held that, having appropriated the benefits, the bank must affirm or rescind in toto; that it could not disaffirm as to those parts which imposed an obligation, and affirm it so far as it operated to its advantage, and that the entire arrangement was ratified.

In *Whitlock vs. Heard,* 3 Rich. 88, the plaintiff was a carriage-maker, and his shop was under the management of W., as his foreman. W. owed the defendant by note, and made and delivered to her a buggy belonging to the plaintiff, in exchange for the note.

The plaintiff, on hearing of this, disapproved of the arrangement, and brought his action for the price, alleging it to have been sold. It was held that he could not recover; that, regarding him as having adopted the contract, he would then be only entitled to the note; regarding him as having repudiated the contract, there would then be no sale of the buggy, and that his remedy was, after demand, to bring trover.

In *Berkshire Glass Co. vs. Wolcott*, 2 Allen, 227, 79 Am. Dec. 787, an agent was entrusted with chattels for a certain specified purpose; he wrongfully sold the goods, and received payment in money. The principal brought an action of assumpsit against the purchaser for the price. It was held that he could not recover in assumpsit, the purchaser not having sold the property and received the money for it, but that the plaintiff might have recovered in an action of tort. The same principle is recognized in *Jones vs. Hoar*, 5 Pick. 285. In the case at bar, there is no claim that the defendant had sold the piano.

In *Butler vs. Hildreth*, 5 Met. 49, an insolvent conveyed away his property in fraud of his creditors. The trustee brought a suit against the purchaser to recover the value of the property; then he discontinued that suit, and brought an action to set aside the sale on the ground of fraud. It was held that, having brought an action *ex contractu*, the sale was affirmed, and the latter action could not be maintained.

In *Marsh vs. Pier*, 4 Rawle, 273, 26 Am. Dec. 131, the defendant purchased goods from A., as agent of the plaintiff, who brought an action and recovered judgment for the price. Afterwards the plaintiff disavowed the agency and brought replevin for the goods. It was held that the record of the former judgment was conclusive as an affirmance of the sale.

A vast number of other cases establishing the same principle might be cited, but the above will suffice. No conflicting cases were cited by the plaintiffs, unless *Stewart vs. Woodward*, 50 Vt. 78, 23 Am. Rep. 488; and *Squires vs. Barber*, 37 Vt. 558, are to be so regarded.

In the first of these cases, an agent of the plaintiffs, who were merchant tailors, owed the defendant, who was a physician, a private debt for medical services for himself and family, and being unable to pay money, persuaded the defendant to take a suit of clothes out of the plaintiff's shop in part payment, which was done. The court allowed the plaintiffs to recover of the defendant the

price of the suit in an action of book-debt, on the ground that the act of the defendant in receiving and converting the goods to his own use raised an implied promise to pay for them. The opinion of the court is very brief, and contains no discussion as to the form of remedy, and no reference to the authorities generally. As to the form of remedy, it is manifestly difficult to reconcile the case with some others we have cited. In regard, however, to the question whether the suit would be effectual as a ratification of their agent's act, we suggest this distinction, that the act of the agent in paying his private debt with the plaintiff's goods could not, perhaps, be regarded as an act done for or in behalf of the principal at all, nor even in the principal's name, and was not properly a contract of sale at all, so that there was no express contract to be affirmed by the bringing of the suit, and nothing to prevent the raising of the implied promise except the fact that the defendant had not sold the goods and received money therefor. It is doubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind.

The other case cited from 37 Vt. 553, was very similar in the principles that apply. An agent of the plaintiffs, who had authority to sell their goods, became insolvent, and owing the defendant a private debt, undertook to pay it out of the plaintiff's goods, the defendant being charged with knowledge of all the circumstances at the time. The plaintiffs sued in assumpsit, and the defendant, instead of denying the plaintiff's claim, undertook merely to set off the debt against their claim, which, of course, could not be done.

There is error in the judgment complained of, and it is reversed.

(118 NEW YORK, 563.)

HYATT vs. CLARK.

(New York Court of Appeals, February, 1890.)

Cross actions between the same parties. Clark sought specific performance of a clause in a lease providing for its renewal and

Hyatt sought the cancellation of the lease on the ground that it had been executed by an agent in excess of his authority. Mr. Lake was Mrs. Hyatt's agent, holding a power of attorney from her. In January, 1880, he entered into negotiations with Mr. Clark for the leasing to the latter for a long period of certain premises in New York city, belonging to Mrs. Hyatt. Clark raised some question as to the sufficiency of Lake's authority under the power, which gave him no express power to make leases, and Clark wrote to Mrs. Hyatt, who was then in England, concerning the matter. While waiting a reply, the lease was executed and delivered to Clark who accepted it conditionally awaiting the reply from Mrs. Hyatt. Mrs. Hyatt sent a cable message to Lake cancelling his authority and directing him to sign no lease. Lake showed this message to Clark who refused to permit the lease to be cancelled, saying he would take the risk, and went into possession. Lake informed Mrs. Hyatt that the lease had been executed before the receipt of her message and could not be cancelled or avoided. He did not inform her that it had been conditionally accepted until November 10, 1884. In the meantime she had accepted the rent provided for by the lease. Judgments were rendered against her and she appealed.

William Man, for appellant.

Joseph H. Choate and *Sanger & Davis*, for respondent.

VANN, J. We do not deem it important to decide whether the power of attorney authorized Mr. Lake to execute the lease in question or not, because, in either event, the same result must follow, under the circumstances of this case.

If, on the one hand, he acted without adequate authority in giving the lease, both the lessor and lessee knew it, for both knew the facts and both are presumed to have known the law, and the former, at least, had an absolute right to disaffirm the contract. As she knew the contents of the power of attorney and the lease, and that the latter was executed by her agent in her name, it was not necessary that she should be informed of the legal effect of those facts. *Kelley vs. Newburyport & Amesbury Horse R. R. Co.*, 141 Mass. 496; *Phosphate Lime Co. vs. Green*, L. R. (7 C. P.) 43; Mechem on Agency, sec. 129.

Whether influenced by caprice or reason, if she had promptly notified the lessee that she repudiated the lease because her agent had no power to execute it, their rights would have been forthwith

terminated and they would have had no lease. The right to disaffirm on one tenable ground would, if acted upon, have been as effective as the right to disaffirm upon all possible grounds. Under the condition supposed, the law gave her the same right to disaffirm without any agreement to that effect, that she would have had if her agent, being duly authorized to lease, had expressly provided, in the written instrument, that she could disaffirm if she chose to do so. Therefore, by accepting the rent of the demised premises for more than four years without protest or objection, she ratified the lease as completely as she could have if she had known of two grounds upon which to disaffirm, instead of only one. Two grounds could not make the right any more effectual than one. If she had the right at all, the number of grounds upon which she could justify its exercise is unimportant. Her ratification was none the less complete, because, being unwilling to run the risk of a doubtful question of law, she did not at once act as she would have acted if she had known all of the facts. As said by the court in *Adams vs. Mills*, 60 N. Y. 539, "the law holds that she was bound to know what authority her agent actually had." Having executed the power of attorney, she is conclusively presumed to have known what it meant and the extent of the authority that it conferred. (Best on Evidence, 123; Whart. on Evi. § 1241.)

If the lease was *ultra vires*, therefore, by ratifying it, she in legal effect executed and delivered it herself, and whatever was said between Lake and Clark, became immaterial. Even if they agreed that she should have the right to disapprove, it is of no importance, because she had that right without any such agreement. If her agent had no power to execute the lease, the delivery thereof, whether absolute or conditional, could not affect her rights. If she was dissatisfied with it, she could have been relieved of all responsibility thereunder by promptly saying to the lessees: "This contract was not authorized by the agency I created, and I refuse to be bound by it." After that there would have been no lease. If the action of her agent was unauthorized, it did not bind her, until by some act of ratification she bound herself. By ratifying, she waived any right to disaffirm upon any ground, known or unknown, because the lease did not exist, as a lease, by the act of her agent, but by her own act of confirmation.

If, on the other hand, Mr. Lake was duly authorized to give the lease, certain presumptions of controlling importance spring from

that fact. He is presumed to have disclosed to his principal, within a reasonable time, all of the material facts that came to his knowledge while acting within the scope of his authority.

It is laid down in Story on Agency (sec. 140), that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject matter of his agency, for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal."

In other words, she was chargeable with all the knowledge that her agent had in the transaction of the business he had in charge. (*Ingalls vs. Morgan*, 10 N. Y. 178; *Adams vs. Mills, supra; Myers vs. Mutual Life Ins. Co.*, 99 N. Y. 1, 11; *Bank of U. S. vs. Davis*, 2 Hill, 451; *Higgins vs. Armstrong*, 9 Col. 38.)

It was his duty to keep her informed of his acts and to give her timely notice of all facts and circumstances which would have enabled her to take any step that she deemed essential to her interests.

She does not question the good faith of Mr. Lake, and there is no proof of fraudulent collusion between him and Mr. Clark, who, while under no obligation to inform Mrs. Hyatt of the facts, had the right to assume that her agent had done so. (*Ingalls vs. Morgan, supra; Meehan vs. Forrester*, 52 N. Y. 277; *Scott vs. Middleton, U. & W. G. R. R. Co.*, 86 Id. 200, *ante* p. ——.)

It was her duty to protect her interests by selecting an agent of adequate judgment, experience and integrity, and if she failed to do so, she must bear the loss resulting from his inexperience, negligence or mistaken zeal. After the lapse of sufficient time, therefore, she is presumed to have acted, with knowledge of all the acts of her agent, in the line of his agency.

By accepting and retaining the rent, which was the fruit of her agent's act, for nearly five years without objection, she is presumed to have ratified that act. (*Hoyt vs. Thompson*, 19 N. Y. 207; *Alexander vs. Jones*, 64 Iowa, 207; *Heyn vs. O'Hagen*, 60 Mich. 150, *post* p. ——; 2 Greenl. on Ev. §§ 66, 67.) Without expressing any dissatisfaction to the lessees, she received eighteen quarterly payments of rent before electing to avoid the lease. She made no

offer to return any part of the rent so paid, although she tendered back the amount deposited to her credit for the nineteenth quarter at the time that she demanded possession of the premises.

Independent of what she is presumed to have known through the information of her agent, she in fact knew the terms of the lease and that it was executed by Mr. Lake in her name.

Upon her arrival in this country in September, 1880, she visited the premises and saw the additions and improvements that the tenants were making thereto, and at that time as well as subsequently, rent was paid to her in person. Apparently she had all the knowledge that she cared to have, for she made no inquiry of her agent until about six months previous to the expiration of the first term of five years, and not until after the lessees had given notice of their election to continue the lease for a second term. Thinking that the rent was low, she then tried to find out something from her agent that would enable her to avoid the lease and as a result of her efforts in this direction, ascertained the fact upon which she based her right to succeed in this litigation. But it was then too late for her to disaffirm, because her long silence and many acts of ratification had been relied upon by the tenants, who had expended a large sum of money in making permanent improvements on the property. Having received the benefits of the contract, she could not, after years of acquiescence, suddenly invoke the aid of the courts to relieve her of any further obligation, because she had but recently discovered a fact that she should have ascertained, and which the law presumes that she did ascertain, long before. (1 Am. & Eng. Encyc. of Law, 429.)

We think that after ample opportunity for election and action she ratified the lease and that her ratification was irrrevocable.

In each action the order appealed from should be affirmed and judgment directed upon the stipulation in favor of the respondent, with costs of appeal to this court in one action only.

NOTE.—In *Kelley vs. Newburyport Horse Railroad*, 141 Mass. 496, it is said: "The second request sought to incorporate into the doctrine of ratification a new element, namely, that in order to make a valid ratification, the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a full knowledge both of the law and facts, have ratified the contracts by some independent and substantive act. This request was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid down, when one purposely shuts his eyes to means of information within his own possession

and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have. *Combs vs. Scott*, 12 Allen, (Mass.) 493, 497; *Phosphate of Lime Co. vs. Green*, L. R. 7, C. P. 43, 57."

(4 KEYES, 469.)

HAZARD vs. SPEARS.

(New York Court of Appeals, September, 1868.)

Plaintiffs were factors in the city of Buffalo. Defendants, who lived in Indiana, sent a large quantity of hams to plaintiffs to be sold at not less than seven and three-fourths cents per pound. Plaintiffs advanced to defendants, on the hams, $5,025, on April 2, 1861, the day of their receipt. On the 26th of April, plaintiffs made a contract for the sale of the hams to one Perry of New York city, at the price fixed and shipped him one car load, being about one-third, against which they drew and received $1,500. The remainder were shipped soon after, but Perry failed about the time he received them. The sale to Perry was made through his agent, Howe, who drew drafts on Perry for the price. Plaintiffs hurried to New York and induced Perry to give up these hams upon their surrendering the drafts. They then tried to sell them in New York, but without success, and they therefore delivered them to Perdue & Ward, who were acting as factors for defendants, to be disposed of to the best advantage. They were subsequently sold at a loss. Plaintiffs wrote to defendants fully concerning the affair and received several letters from them, none of which expressed any dissatisfaction with plaintiffs' conduct. In June plaintiffs had a personal interview with defendant Spears, who then imputed no blame to them. This action was to recover the balance of plaintiffs' advances to defendants. The defense was that plaintiffs must account for the deficiency caused by the sale at less than the price fixed. Plaintiffs recovered and defendants appealed.

Benjamin H. Williams, for appellants.

John Ganson, for respondents.

HUNT, C. J. The sale of the hams in New York, at a lower price than that fixed by the defendants, and obtained by the plaint-

iffs in Buffalo, gives rise to the present controversy. The plaintiffs were limited in price by the order of the defendants. They were expressly directed not to sell them for less than seven and three-fourths cents per pound. The sale made in Buffalo was at that price, but the purchaser failed to pay, and the sale was rescinded. The expenses of the property to New York, and the sale there, together with the fall in price, produced the loss for which the amount of the verdict was given.

Immediately upon his return from New York, Mr. Hazard, one of the plaintiffs, wrote to the defendants, giving a full account of the transaction; and informed them that the hams had been left with Purdue & Ward, to dispose of to the best advantage. In the several letters, the defendants acknowledge the receipt of this information, and made no claim that they did not approve of the entire proceeding. The judge, at the trial, decided that these letters did not constitute a ratification of the transaction. The case does not furnish the ground of this decision. I presume it was from the fact that it is assumed in each of the letters, that the $1,800 paid was upon the purchase of the entire quantity of hams, and would go to reduce the loss that would arise from the entire sale. In truth, this sum was received in payment of a specific portion of the hams, one car-load, and would mitigate the loss upon that portion only, leaving the entire loss upon the remaining portion unprovided for. This would produce a great difference in the general result, and was an important fact in the case. The defendants' ratification, assumed from their failure to object, being based upon an erroneous understanding of the facts, could not bind them. I think the ratification that might be supposed to arise from this view of the case, must be abandoned.

The question then arises, did the conversation in June, 1861, between the defendant Spears and the plaintiff Hazard, furnish evidence on which the jury are at liberty to find a ratification? By the letters already referred to, the defendants had been informed of the entire transaction, with the erroneous understanding on their part as to the $1,800 already mentioned. They had been distinctly informed that the property was left with Purdue & Ward for sale, and without limit as to price. In the conversation now referred to, all the transaction is again rehearsed to Mr. Spears, the understanding as to the $1,800 is now corrected, and he is informed that the property is left with the New York house for sale, without limit. As testified by Mr. Hazard, he made no

objection to the transaction; imputed no blame to the plaintiffs, and expressed his regret at the probable loss. Mr. Spears, himself, testifies that he did not feel it his duty to be frank with the plaintiff, or to tell him that he would be held liable for the sale of the hams.

Under the circumstances stated, the title to the property thus in the hands of Purdue & Ward, was in the defendants. If a change in the market had occurred, by which the price had advanced, the benefit would have accrued to the defendants, and not to the plaintiffs. The sale to Perry was made by the plaintiffs, as the agents of the defendants, and upon his failure to perform, as such agents, they resumed the possession of the property. They, as such agents, also left it with Purdue & Ward for sale, without limit as to price. All this was communicated to Spears in person. If he wished to repudiate what had taken place, and to countermand the directions for sale, given in behalf of his firm, and to hold the plaintiffs to the first instructions, it was his duty to have done it promptly. It should have been done on the spot, or certainly within a few days. In fact, there was no renunciation or countermand until the 5th of September thereafter, although a doubt on the subject of their liability to bear the loss was intimated in a letter of the 8th of August.

In *Prince vs. Clark*, (1 Bar. & Cr. 185, 8 Eng. Com, Law, 80), the plaintiff had shipped, by the defendant, certain goods to the East Indies for sale, with directions to invest the proceeds in specified articles. The defendant invested the amount in Benares sugar, which was not one of the specified articles, and advised the plaintiff of the purchase by a letter, received by him on the 29th of May. The plaintiff made no objection until the 7th of August, when he notified the defendant's agent that he disowned the purchase. The jury held, that by his delay he had assented to the acts of the agent, and the court of King's Bench affirmed their verdict.

BAILEY, J., says: "The principal has no right to pause and wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial. He is bound, if he dissents, to notify his determination within a reasonable time."

HOLROYD, J., says: "I think the jury might fairly infer, from the facts of the case, that the plaintiff did once assent to take the cargo on his own account, or that he meant, at least, to take the chance of the market."

It was objected, in that case, that the defendant had no agent to whom notice could be given, and that he could receive no benefit from the notice. The court held, nevertheless, that an agent might have been found by inquiry, and that the verdict was justified.

The defendants insist that this principle does not affect this case, because, they say, that Howe was liable on the drafts given up to Perry; that he was solvent, and that Spears was not advised of this state of things by Hazard in the June conversation. There are two answers to this objection. It does not appear that Howe was personally liable on the drafts drawn on the produce shipped. It appears, very distictly, that he was acting in transaction of the purchase, as the agent of Perry, and thus without interest. Whether the drafts drawn by him upon Perry were drawn as agent, or whether he voluntarily made himself liable upon them, is not proved, and, I think, cannot be assumed. Another, and quite a satisfactory answer is this, that no such point was raised on the trial. If the defendant claimed that the conversation and the delay to repudiate, did not furnish evidence of assent, because Spears was not informed of the fact that Howe was liable on the drafts, and was solvent; he should have called attention on the trial, to the precise point of which he complained. It was plainly stated that the drafts, whatever they were, were given up to Perry as a means of obtaining the return of the property. This, the defendant Spears certainly knew, and if he had not been informed of the other alleged facts, and had, on the trial, placed himself on that ground, the plaintiffs would then have had the opportunity of showing how the facts were, and what was the statement of them to Spears. To allow it now to be urged, when it was omitted at the proper time, would be quite unjust. The point is of frequent occurrence, and we rule upon it at nearly every term.

In the same manner the defendants object, that Spears was not informed by Hazard that the sale was in fact to Perry and not to Howe. If this fact is of importance, the answer to the objection is the same as that given to the preceding one, that attention was not called to it on the trial.

The defendants also insist that the judge erred in refusing to charge, that, if, in the conversation referred to, Hazard did not entertain the idea of procuring a ratification, and Spears did not intend to ratify the plaintiffs' acts, there was no ratification. If Hazard's testimony is to be relied upon,—and it was believed by the

jury,—he had acted, as he supposed, faithfully and honestly in the discharge of his duty as the defendants' agent, in making the sale, in recapturing the property, and in directing its resale by Purdue & Ward, at the best price that could be obtained. Upon the first opportunity he communicates all the facts orally to Mr. Spears. The question then is, what is the legal effect of all this, with the answers of Spears in connection? If both Hazard and Spears had certainly thought that the transaction was right in itself and could not be disturbed or repudiated, and that no ratification could improve it, and therefore had no intention on the subject, would that have altered the legal effect of what they said and did? Or if Spears was satisfied that he had an advantage of Hazard, and meant to stand upon his strict rights, and at some convenient time to assert them, and yet, upon a full and frank statement of all the facts, made no visible or audible repudiation of the transaction, would he not have been concluded by his silence? The case of *Prince vs. Clark,* is clear to the point that he would be. The law passes its judgment upon, and gives legal effect to, what is said and done. Intentions, except as they are manifested by the acts and statements of the parties, are of no avail.

Affirmed.

(60 MICH. 150.)

HEYN vs. O'HAGEN.

(Supreme Court of Michigan, January, 1886.)

Assumpsit, to recover for goods sold and delivered. In August, 1884, a shoemaker, living in Marquette, who carried on business in a shop in which defendant had formerly carried on business, bought goods of plaintiff, who lived at Ishpeming, asserting that he was in defendant's employment and was purchasing for him. He afterwards procured other goods in the same way. He had no authority to act for defendant, and defendant received none of the goods, though they were sent, in each case, by express to his address. An invoice of each purchase was also sent to defendant. The other facts appear in the opinion. The plaintiff recovered, and defendant brought error.

F. O. Clark, for appellant.

Hayden & Young, for plaintiff.

CHAMPLIN, J. (after stating the facts). The principle is well established, "That if a man either by word or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." *Cairncross vs. Lorimer,* 7 Jur. (N. S.) 149; *Truesdail vs. Ward,* 24 Mich. 117, 134, and cases cited on page 135.

But there can be no estoppel unless the plaintiff was induced to take some action in reliance upon the statement or conduct of the defendant which otherwise he would not have taken, and which operated to his prejudice. "Expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditures." *Meister vs. Birney,* 24 Mich. 435.

The finding of the facts show that the plaintiff, upon selling the first bill, took the precaution to mail the invoice directly to defendant, and to send the goods by express directed to him. This invoice was received through the mail in due course, and within three or four days after its date; and defendant suspected immediately that this shoemaker, who was doing business in the shop formerly occupied by him, had ordered the goods in his name, and two or three days thereafter went to this person and asked him about it, and found his suspicion true; that is, that he had ordered the goods in his name, and also that this person had obtained the goods which had been shipped to him. Notwithstanding he had now become fully informed of the fact that this shoemaker had represented himself to the plaintiff to be the agent of defendant, and had ordered the goods for him or in his name, and knew that the goods were invoiced and consigned to him, yet he did nothing and said nothing to repudiate the transaction, or to inform the plaintiff that he had not received the goods, and had not made the purchase.

The fact further appears that defendant had been engaged in the shoemaking business at Marquette, and at some time previous had purchased, in person, like goods of plaintiff. When plaintiff

called upon defendant for pay, he suggested that they both should go together to the shop of the man who had ordered the goods. Both invoices were found at the shop, and the man made payment of $21, which was then indorsed upon the first invoice, and defendant promised the plaintiff that he would see that he got the balance of the money.

Now it cannot be presumed that what occurred in the shop at that time between the parties had no influence upon the conduct of the plaintiff. Had defendant repudiated the transaction and refused to pay for the goods, the plaintiff might have immediately proceeded to obtain possession of them, and to take such other remedy as the law afforded, to secure his rights. Defendant's promise of payment estopped him from afterwards asserting that he was not bound by it. The plaintiff relied upon it, and has instituted this suit to enforce it. Under the authority of *Meister vs. Birney,* he should be entitled to recover. But he need not rely alone upon the doctrine of estoppel. Under the facts found, the question is clear to me that the defendant has ratified the act of the shoemaker in ordering the goods in the name of the defendant. "To ratify is to give sanction and validity to something done without authority by one individual on behalf of another:" Evans, Ag. 48. Ratification may be express or implied. When there is no express ratification, the facts and circumstances from which a ratification may be inferred must be such as are inconsistent with a different intention. Here, the ratification, if any exists, must be inferred from the silence of defendant, and his neglect to inform the plaintiff that he had not authorized the shoemaker to purchase goods on his credit, or to order them in his name, after he was fully informed of the facts.

In considering whether the facts and circumstances of a particular case are sufficient evidence of a ratification, the distinction has been made between the unauthorized act of an agent, where the relation of principal and agent already exists, and that of a mere volunteer or stranger. In the former case it is said that an intention to ratify will always be presumed from the silence of the principal after being informed of what has been done on his account, while in the latter case it has been said there exists no obligation to repudiate the transaction, nor will silence be construed into a ratification. 2 Duer, 154, 178–182, note 5; 1 Arm. Ins. 151; Story Ag. §§ 255, 258; *Ward vs. Williams,* 26 Ill. 451; *Gold Min. Co. vs. National Bank,* 96 U. S. 640.

Whether silence operates as presumptive proof of ratification of the act of a mere volunteer must depend upon the particular circumstances of the case. If those circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to, and relying upon, such assumed agency, or to induce him to believe such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency.

The rule is stated by the Supreme Court of Wisconsin in the case of *Saveland vs. Green*, 40 Wis. 438, as follows: "The rule as to what amounts to a ratification of an unauthorized act is elementary, and may be stated thus: When a person assumes in good faith to act as agent for another in a given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must, within a reasonable time, disaffirm the act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act."

The qualification of good faith is, it seems to me, unnecessary in the person who assumes, without authority, to act as agent. If the person with whom he deals as agent acts in good faith, and with reasonable care, the act is capable of being ratified by the person on whose behalf such pretended agent assumes to act, whether the agent himself acts *bona fide* or *mala fide*.

In this case the direct results of the silence of defendant, and his neglect to inform plaintiff in a reasonable time after he was fully informed of what had been done, was to lead plaintiff into the belief that the shoemaker was in fact the agent of defendant, and caused the plaintiff to sell to defendant, as he supposed, another invoice of goods, which he sent to defendant by express, and also mailed to him the invoice of the second bill, which defendant received. Here, by his silence, he permitted this shoemaker, whose name neither the plaintiff nor defendant knows, to defraud the plaintiff by pretending to act for and on his behalf. Under these circumstances the defendant, by his silence and tacit acquiescence in the conduct of the shoemaker, must be held to ratify the agency. Defendant knew that the goods were sent to him by express, and knew that the shoemaker had in some manner gotten possession of the goods from the express company. How, it does

not appear; whether by defendant's direction or assent, or by the shoemaker's representing himself to the company as the agent of defendant. Defendant, however, knew that the shoemaker had received both consignments of goods from the express office, and he had left both invoices with the shoemaker. He went with plaintiff to the shop occupied by the shoemaker, who then paid $21, which was endorsed upon the first invoice, and defendant then told the plaintiff that he would see that he got the balance of the money, but forbade him from sending any more goods in that way. This promise was not to pay the debt of another, but his own debt. It does not appear that defendant at this time repudiated the agency or the authority of the shoemaker to order the goods upon his credit. He had, by his contract, ratified the act, and his promise was not that he would see that the shoemaker would pay the balance, but that he would see that he got the balance of the money.

The statute of frauds has no application to the facts of this case. It was the promise of the defendant to pay his own debt, made so by his ratification of the act of the shoemaker in ordering the goods in his name. He remained silent when he should have spoken, and by his silence led the plaintiff to believe that he was his debtor, while lying by and seeing another person appropriate goods which had been consigned to him under representations that he had ordered them.

The judgment should be affirmed.

(42 MAINE, 157.)

RICE vs. McLARREN.

(Supreme Judicial Court of Maine, 1856.)

This was an action to recover the price of the brig Typee which the plaintiff claimed to have sold and delivered to the defendant. The brig was wrecked and lost before payment was made.

Bradbury, for plaintiff.

Hayden, for defendant.

MAY, J. (Omitting irrelevant portion.) The case shows that the vessel, as early as the 11th of November, was taken into

possession by the defendant, and that he from that time, acting in connection with Capt. Larkin, as master under him, took the exclusive management and control of her. He procured freight for her, and sent her to sea a few days only before her loss. This was done with the assent of Mr. Wheeler, the agent of the plaintiff, who informed the defendant at the time he took possession that "the vessel was to be at his expense and risk from that day." The plaintiff, from that time, ceased to exercise any control over her, and would not have been liable for repairs subsequently made without his direction. *Cutler vs. Thurlo,* 20 Maine, 213; *Tyler vs. Holmes,* 38 Maine, 238.

These acts of the plaintiff's agent appear to have been either previously authorized or subsequently ratified. As early as the 9th of November, the plaintiff wrote to him from Wilmington, informing him of the defendant's offer, and of its acceptance. This letter contains the following language: "You will get all the money you can, and take such security for the balance as for assurance of * * *. See that it is right. He will perhaps pay all. If so, it will suit much better. *Still, do whatever will make sale and close up Typee.*" The authority here given is very broad. It is said, however, that these important acts of the agent must have been done before the reception of the letter. This fact, if it be a fact, does not alter the case. When received, it was a complete ratification of the acts, especially as there was no subsequent attempt to revoke them. These acts of the parties, in transferring and accepting the possession and control of the vessel, amount to an absolute and unconditional delivery under the contract. There seems to be nothing in the case to qualify this delivery. If the delivery had been upon conditions not performed, the property might not have passed. *Hussey et al. vs. Thornton et al.,* 4 Mass. 405, 3 Am. Dec. 224; *Smith vs. Dennie,* 6 Pick. 262, 17 Am. Dec. 368. Under the circumstances, we think it did pass. * * *

Judgment for plaintiff.

NOTE.—See *Moore vs. Lockett,* 2 Bibb, (Ky.) 67, 4 Am. Dec. 683; *Stillman vs. Fitzgerald,* 87 Minn. 186.

(68 ALABAMA, 167.)

JONES vs. ATKINSON.

(Supreme Court of Alabama, December, 1880.)

This was an action of statutory detinue brought by Atkinson against Jones to recover a certain mule called *John*. Plaintiff had rented a mule called *Jerry* to one Pritchett; Pritchett traded *Jerry* for *John;* then he traded *John* for a mare with one Clanton; and Clanton sold or traded *John* to the defendant.

Defendant requested the court to charge that, if the jury believe there was no sale of the mule *Jerry* by plaintiff to Pritchett, but simply a hiring; and that when *Jerry* was traded for *John*, the plaintiff ratified the trade; then, if Pritchett afterwards traded *John* for the mare, and, while Pritchett had her, plaintiff claimed her as his own and offered to trade her away, this was a ratification of the trade of *John* for the mare, and plaintiff cannot recover. This the court refused. Plaintiff recovered, and defendant brings error.

R. Gaillard and *Jno. Y. Kilpatrick,* for appellant.

S. J. Cuming, contra.

STONE, J. When we first considered the charge refused in this case, we doubted somewhat whether the hypothesis or premises, justified the conclusion it invoked. Knowledge of the unauthorized act done is a necessary element in every binding ratification and knowledge is not expressed in the charge, as one of the conditions on which a verdict for the defendant was claimed. We now think that, under the facts and circumstances shown in the evidence, that constituent was necessarily implied. The acts of the ratification supposed in the charge are, that Atkinson, while said mare was in the possession of Pritchett, claimed her as his property, and offered to trade her. The undisputed facts are, that Pritchett had in his possession a mule called Jerry, which Atkinson claimed as his property; that Pritchett traded the mule Jerry for a mule named John, and Atkinson ratified the trade, and claimed the mule John as his property, and that subsequently Pritchett traded the mule John for the mare called the "Clanton mare." Now, the only claim Atkinson could have or assert to the mare, rested on the title he acquired by the exchange of the mule John for her.

This claim, if he made it, rests alone on the fact that she stood in the place of the mule John. If he claimed the mare, and if he asserted and attempted to exercise acts of ownership over her, this was a ratification, and being once made, he could not revoke it, unless it was made under a misapprehension of facts. His right and claim to the mare had no foundation to rest on, unless he had parted with right and claim to the mule. He could not claim both, and claiming one, he renounced the other.

The case of *Meehan vs. Forrester*, 52 N. Y. 277, presented a question of ratification *vel non*. Pinkney, as the attorney and agent of Bertine, was intrusted with the collection of a claim due the latter. Without any authority from his principal, Pinkney took from the debtor a deed to lands, absolute on its face, but intended as security only. The Court of Appeals said: "There was no dealing on the subject between the plaintiff (debtor) and Bertine, except through Pinkney. The evidence justifies the inference that the deed was received by Pinkney for Bertine, in pursuance of the agreement made between Pinkney and the plaintiff, and delivered by Pinkney to Bertine.

"The agency of Pinkney was to collect the debt, not to purchase lands. When, under those circumstances, Pinkney delivered to Bertine the deed obtained from the plaintiff, it was the duty of Bertine to inquire, and of Pinkney to communicate, under what arrangement the deed had been obtained. In the absence of any evidence to the contrary, the presumption is that these duties were performed. If not, and Bertine received the deed blindly, without receiving or making any inquiry, he must be deemed to have confided the whole matter to his attorney, and adopted whatever arrangement the latter may have made to obtain the deed." *Carving vs. Southland*, 3 Hill, 552. And a ratification once made becomes irrevocable. Wharton on Agency, § 73; *Buck vs. Jones*, 16 Texas, 461; *Clark vs. Van Riemsdyk*, 9 Cranch, 153; *Seago vs. Martin*, 6 Heisk. 308; Story on Agency, § 253; *Lee vs. Fontaine*, 10 Ala. 755; *Firemans' Ins. Co. vs. McMillan*, 29 Ala. 147; *Crawford vs. Barkley*, 18 Ala. 270. In *Lee vs. Fontaine, supra*, it is said: "Even the silence of the principal will, in many cases, amount to a conclusive presumption of the ratification of an unauthorized act."

The charge asked should have been given.

Reversed and remanded.

(62 MAINE, 330.)

SCHOOL DISTRICT vs. ÆTNA INSURANCE COMPANY.

(Supreme Judicial Court of Maine, 1873.)

Action upon a policy of insurance upon the district school-house. Defense, that the district had sold the school-house. It appeared that the committee were authorized by resolution to sell the building, and had sold it for some cash and balance in notes. The committee had retained the notes and cash in their own hands, and the district never had any benefit from them, and passed resolutions condemning the sale at the first meeting held after the sale had been made. The jury rendered a special verdict, and judgment was for the plaintiff.

Wales Hubbard, for defendant.

Gould & Moore, for plaintiff.

PETERS, J. The fact that the sale of the school-house in question was, in most part, upon credit instead of for cash, as the vote of the district imported it should have been, settles this controversy for the plaintiffs. This phase of the case does not appear to have been presented in any of the bills of exceptions or motions considered by the court before.

The authority was by recorded vote easily to be seen and understood by those concerned. It is needless to cite cases to establish the general principle that a specific authority or direction to sell does not authorize a sale on credit, unless, at the place of sale there is an usage of business, general or special, in reference to which an authority to sell upon credit, is supposed to be given. It is suggested in argument that this doctrine may be inapplicable to persons, acting as agents for *quasi* corporations, like towns and school districts, and that they might be regarded from convenience and necessity, as clothed with executive and prudential power, superior to that of agents of ordinary business corporations or persons. We find nothing in the authorities, and see no reason upon principle, in support of such a modification of the general rule. If there is any distinction, it would seem that the acts of public agents, acting in pursuance of a special authority are to be construed perhaps more strictly than the acts of agents of private persons, upon the

ground that public agents are less within the immediate supervision and control of their principals. *State of Illinois vs. Delafield,* 8 Paige, 527; s. c. 26 Wend. 192; *Cushing vs. Longfellow,* 26 Maine, 306. The jury, by a special verdict, find that the sale was made upon one year's credit, except ten per cent cash; that the proceeds of the sale never came into the possession of the district, nor were used by them; and that the district never ratified the sale. These findings are supported by the evidence.

The district would not be bound by the sale made without authority, unless in some way by them ratified. The ratification must be by the principal, and not by the agent of his own acts. The retention of the money and notes by the committee, unless consented to by the district, would be no more evidence of an authorized contract than their taking the same originally would be. The ratification must be proved. It is not in this respect like a contract obtained by fraud which stands till rescinded; but a contract made by an agent without authority is no contract unless shown to be ratified, though such ratification may, under a variety of circumstances, be presumed. A presumption from the non-action of a corporation like a school district, would be less readily inferrible than in the case of individuals who can more readily act. A district can be bound only by some recorded vote, or some act, or an acquiescence upon their part as a corporation, equivalent thereto. The unofficial conduct of individuals in the district has no controlling effect. As bearing upon these general propositions see *Chamberlain vs Dover,* 13 Maine, 474, 29 Am. Dec. 517; *Davis vs. School District in Bradford,* 24 Maine, 349; *White vs. Sanders,* 32 Maine, 188; *Fisher vs. School District in Attleborough,* 4 Cush. 494; *Bliss vs. Clark,* 16 Gray, 60.

In this case, the sale was not warranted by any vote. All parties are presumed to have known it. The proceeds of the sale have remained in the hands of the committee from that day to this. The district have neither had nor used them, directly or indirectly. They were neither deposited with the officers of the district who dispense its funds and credit, nor with the town treasurer where the money of the district should be kept. The committee never informed their principals of their action in any official communication or form whatever. Beyond all this there is plenary evidence to inspire the belief that the committee, with the full knowledge of the vendees, were executing the trust committed to them, in some respects at least, unfaithfully. The rule that where a prin-

cipal has full knowledge of the acts of his agents, he must dissent, and give notice of his dissent within a reasonable time, is stringent in its application only where the agent and those dealing with him are acting in good faith, and the principal receives a direct benefit therefrom. Here no benefit whatever, but, on the other hand, an injury would have accrued from the action of the committee, if about four hundred dollars were to be received for a property, admitted in the report of the case to have been worth several times that sum. All the subsequent corporate action of the district, so far as any appears, shows that the sale was repudiated. An insurance on the building was renewed. Attempts were made to hold district meetings in the house. An effort was undertaken to have the building put back to the place from which the purchasers removed it. The persons claiming to own the building were prosecuted by a vote of the district as trespassers (although the suit was subsequently withdrawn), a significant evidence of disaffirmance of the contract attempted to be made. Upon all this evidence the finding of the jury upon this point must be deemed to be a correct one; and the rulings and refusals to rule upon the questions involved in such findings were sufficiently favorable to the party excepting. * *

Verdict for plaintiff sustained.

(47 NEW YORK, 199.)

BALDWIN vs. BURROWS.

(New York Court of Appeals, January, 1872.)

Blanchard, Burrows, Prouty, McClellan and Southworth had contributed, in varying proportions, to raise a large fund to be invested in cotton. Blanchard applied to the plaintiffs for an advance upon the cotton, saying that the co-owners had about 1,000 bales and wanted an advance of $30,000 on the whole lot; that he had consulted with the others and that they authorized the arrangement. Blanchard delivered to plaintiffs 255 bales and plaintiffs advanced, between April 5 and April 24, 1886, various sums aggregating $22,000, and on the 25th of April, the further sum of $6,000. All this money was paid to Blanchard, and plaintiffs made no inquiry of the other co-owners as to Blanchard's

authority. On April 24 Blanchard gave Burrows $3,000, Southworth $1,000 and Prouty $3,000, telling them that he had obtained an advance of $15,000 on the cotton. They at first declined to receive it, as they had known nothing about the advances, but Blanchard assured them that the advance had been made on his responsibility, that they were not responsible for it, and that the advance was a personal transaction between plaintiffs and himself. Thereupon they accepted the money.

Plaintiffs sold the cotton received by them and there remained a balance due them of about $17,000 for which they applied to the co-owners, who utterly denied Blanchard's authority to borrow money on their account. Afterwards McClellan separately compromised with plaintiff, and Blanchard became bankrupt, and this action was brought against the others. Plaintiffs recovered in the court below, and defendant appealed.

J. M. Van Cott, for appellants.

J. H. Choate, for respondents.

RAPALLO, J. Three distinct grounds of liability on the part of the defendants were submitted to the consideration of the jury; (1) that of a copartnership resulting from the purposes for which the cotton was purchased; (2) that of express authority to Blanchard from his co-owners to obtain the advances; (3) that of a subsequent ratification by the defendants of the acts of Blanchard. The verdict being general, it is impossible to determine upon which of these three grounds the jury based their verdict, and consequently if it shall be found that either of them was improperly submitted to the jury, the judgment cannot be sustained, unless it shall also appear that some one of them was so clearly established by uncontroverted evidence as to have rendered it the duty of the court to direct a verdict for the plaintiffs. (The court then determines that no partnership existed between the co-owners.)

The question of an express authority to Blanchard to make the shipment and obtained the advances was separately submitted to the jury. The testimony of Blanchard was sufficient to authorize the submission of that question, including the question of the authority of Southworth to consent on behalf of Burrows. But Blanchard's testimony on both of these points was contradicted, and we cannot say that the jury necessarily passed upon them, as they may have rested their verdict upon a finding of copartnership *ab initio*, under the instructions of the court.

It follows that the error in these instructions is fatal to the judgment, unless a ratification was so clearly made out as to leave nothing for the consideration of the jury, and to have rendered it the duty of the judge to direct a verdict for the plaintiffs on that ground.

To test this question, we must look at the testimony of the defendants, for if, according to their version of the transaction, viewed in the most favorable light in which the jury might properly have regarded it, there was not a sufficient ratification to bind the defendants *in solido* for the whole amounts advanced by the plaintiffs, the court would not have been justified in directing the verdict which was rendered.

The defendants, Prouty and Southworth, admit that on the 24th of April, 1866, they received from Blanchard, Southworth, $1,000 and Prouty $3,000, and that Blanchard informed them at the time that he had obtained $15,000 from the plaintiffs, as an advance upon the shipment through them of a portion of the cotton. But they aver, in substance, that when Blanchard offered them his checks and informed them of what he had done, they denied his authority to ship, or to obtain the advances, and refused to receive the checks, but that they were finally induced to accept them, by Blanchard's assurance that he had obtained the $15,000 advance upon the sole credit of Blanchard & Co., and in such a manner as not to render the other defendants responsible to the parties making the advance, in case of a reclamation; that the advance was a transaction between the plaintiffs and Blanchard & Co.; that the defendants had nothing to do with the plaintiffs, and that the payment was a matter between Blanchard & Co. and the defendants; also that Blanchard did not disclose that he had obtained more than $15,000, or that he contemplated obtaining any further advances. That, relying upon these statements of Blanchard, they received the money, Southworth at the same time receiving $3,000 for account of the defendant, Burrows, who was absent; that this latter sum was deposited by Southworth to the credit of a bank with which Burrows was connected, and Burrows advised of the deposit. Burrows testifies that he was informed that this deposit proceeded in some way from the cotton transaction, but how he did not know; that the only authority he had given to Southworth was to look after or watch his interest in the cotton.

All these parties testify that they did not learn the actual facts until long after the cotton delivered to the plaintiff had been shipped to England, and the residue destroyed by fire.

It appears that at the time of the payment by Blanchard, April 24th, $22,000 had, in fact, been advanced by the plaintiffs, and that on the following day they made a further advance to Blanchard & Co. of $6,000, which latter sum is included in the recovery.

As to this latter sum, there clearly was no ratification; nor was it advanced on the strength of the acceptance by Prouty, Southworth and Burrows of the sums paid to them on the twenty-fourth, for it does not appear that the fact of such payments was communicated to the plaintiffs before the advance of the $6,000. From the beginning, the plaintiffs seem to have relied wholly upon the statements of Blanchard as to express authority from his co-owners, and not upon any act of the defendants. The plaintiffs were informed by Blanchard of the separate interests of the defendants, and do not even seem to have supposed that they were dealing with them on the footing of a partnership; for in January, 1867, they wrote to Southworth, that they had charged him with one-fifteenth of the loss on the cotton, and demanded of him that proportion only. They trusted Blanchard's representations at their peril, making no inquiry of Prouty or Southworth, though they both resided in the same city with the plaintiffs; and it does not appear that either they or Burrows had done anything to hold Blanchard out as authorized to contract in their names. This is a case, therefore, which depends upon the actual authority given, or upon the ratification of specific acts; and although such ratification is, as to the act specially ratified, equivalent to a previous authority, it is not retroactive to the extent of binding the principal for other acts in excess of the authority of the agent, though the principal might have been bound for such other unauthorized acts, if they had been done under color of a previous authority actually given. The ratification, therefore, if it had been made out of the borrowing of the $22,000 not having been communicated to the lender, and they not having acted on the faith of it, would not carry with it the subsequent advance of $6,000, (*St. John vs. Redmond*, 9 Porter Ala. R. 428), though it might be that if there had been a previous authority to borrow the $22,000, it would have bound the defendants for the subsequent advance, if the precise limit of the agent's authority had not been known to the lender.

But was there a clear case on the uncontroverted facts of a ratification of the act of Blanchard, in obtaining the advance of the $22,000, or any part of it, on the joint credit of all the owners of the cotton? Assuming the transaction to have been as stated in

the testimony of Prouty, Southworth, and Burrows, Blanchard & Co., were mere bailees of the cotton for the specific purpose of picking and drying it and preparing it for sale, for a compensation to be paid to them by the owners. The unauthorized pledge and shipment of it by Blanchard were, as to the shares of his co-owners, a conversion, which rendered him liable to them for the value of their respective shares. By receiving from him a portion of the advances which he had obtained, on his assurance that he had obtained them on the credit of Blanchard & Co., and in ignorance that their own credit had been used, they did not ratify his use of their names. There can be no ratification of an act without knowledge of the act having been done. The ratification of an act previously unauthorized must, in order to be binding, be made with a full knowledge of all the material facts. (*Owings vs. Hull*, 9 Pet. 608; *Nixon vs. Palmer*, 8 N. Y. 398; *Seymour vs. Wyckoff*, 6 Seld. 224; *Smith vs. Tracy*, 36 N. Y. 79, (*ante* p. 154); 2 Greenlf. Ev. § 66; Story on Agency, §§ 239, 253.) The receipt, even from an agent, of money paid him on a contract, does not bind the principal to the contract, unless he knows on what account the money was received and the terms of the contract. (*Penn. Co. vs. Dandridge*, 8 Gill & J. 323, 29 Am. Dec. 543.)

It cannot be contended, therefore, that so long as the defendants remained ignorant that the advances had been made upon their credit, there was any ratification; but it is claimed that by not offering, when they became apprised of the facts, to return to the plaintiffs the sums which they had received of Blanchard they ratified the original transaction and became liable *in solido* as principals for all the advances obtained from Blanchard & Co. But that result does not follow.

In the first place, the defendants testify that they did not learn the facts until long after the cotton had been sent to England. It was then too late to restore matters to their original condition. Furthermore, according to their statement, they had not received the money as their own, or as arising from a dealing between them and the plaintiffs through Blanchard as their agent, but as the money of Blanchard, in receiving which they dealt with him as a principal. He had misappropriated their property, and they were entitled to payment or indemnity from him. Had they known all the facts at the time, they could rightfully have repudiated his acts, and demanded and received from him the value of their shares. They were not bound to look to the plaintiffs for their

cotton. They could have prosecuted Blanchard, or settled with him, without incurring any liability to the plaintiffs. And even if they had severally received of Blanchard payment or security out of the same money which they knew he had obtained from the plaintiffs by the fraudulent use of their names, and that money could be identified and followed, the receipt of it by them as his money, to indemnify them for his tortious disposition of their property, would not have been a ratification of the contract which he had assumed to make in their behalf, nor would it have rendered them jointly liable for the whole amount of the advance, including what Blanchard retained. They would, at the most, have been liable for what they received.

The mere fact that the proceeds of a contract made by one person in the name of another without authority, or a portion of them, have come to the hands of the latter, is not, of itself, sufficient to render him liable on the contract. (*Penn. Co. vs. Dandridge*, 8 Gill & Johns. [Md.], 323, 29 Am. Dec. 543; *Evans vs. Wells*, 22 Wend. 324; *Palmerton vs. Huxford*, 4 Den. 166-168). To have that effect, the proceeds must be received not only with knowledge, but under such circumstances as to constitute a voluntary adoption of the contract. When goods are purchased by one assuming, without authority, to be the agent of another, if the latter knowingly receives the goods so purchased *as his own property*, this will amount to a ratification of the agency. But if he denies the authority of the pretended agent to act for him on having knowledge of his acts, and afterwards receives the goods as the property of the assumed agent in payment of a debt due from him, it will not amount to a ratification. (*Hastings vs. Bangor House Proprietors*, 18 Maine, 436.) It is conceded in that case, that the seller of the goods would have a remedy against the party who received them, knowing that they had been obtained by fraud. But the remedy would not have been upon the original contract of purchase. Receiving them as the property of the fraudulent vendee, is inconsistent with an adoption of his assumed agency. And if only a portion of the goods were received, the recipient would only be liable for that portion.

Clearly, if the defendants received part of the proceeds innocently, as the money of Blanchard, their subsequent omission to return what they had received could not make them liable upon the original contract; and if they restored the money, they were entitled to recover back their property or its proceeds.

The plaintiffs parted with their money, relying wholly on Blanchard's representations as to his authority. The subsequent receipt from him by the defendants of part of the money, tended in no way to accredit him or to mislead the plaintiffs and raises no equity in their favor, upon which the defendants can be held as joint contractors. It is true that frauds might be committed by putting forward an insolvent party, and obtaining advances through him, and subsequently denying his authority. But there must be some evidence of such fraud to create a liability.

The counsel for the plaintiffs has referred to a class of cases in which it is said that a principal cannot enjoy and retain the fruits or benefits of the act of his agent, without adopting and ratifying the instrumentalities by which those fruits were obtained, even though employed without his authority or knowledge; and also to cases establishing, that if the principal ratifies and enjoys the benefit of part of a contract, he cannot repudiate the rest. The first class of cases referred to are all cases of acknowledged agency or of acts expressly adopted by the principal as done for him, and where the principal is either seeking to enforce a right obtained for him by his agent, or has had the benefit of a contract which he authorized or has adopted as his own; and the controversy has been, not as to the authority of the agent to make the contract, but as to the means employed by him to accomplish what he was authorized to do, or what the principal has accepted as done for him; and the instrumentalities referred to are, in general, frauds committed by the agent in doing the authorized or ratified act.

When the principal seeks to enforce a contract or right obtained for him by his agent, or by one whose agency he has adopted, it is well established that the fraud of the agent may be set up as a defense against his innocent principal, for the very obvious reason that the contract or other right which the principal is seeking to enforce is tainted and vitiated by the fraud employed by his agent in obtaining it; and the principal, though himself innocent, takes it subject to that taint. (*Atwood vs. Small*, 6 Clark & Fin. 449; Story on Agency, sec. 419; Dunlap's Paley, 4th Am. ed. 325; *Veazie vs. Williams*, 8 How. U. S. 134; *Dexter vs. Adams*, 2 Denio, 646.)

The other cases which hold the principal liable to respond for the frauds of his agent, rest upon the familiar doctrine that the principal is bound for the acts of the agent done in the course of his employment, and even for his frauds and other torts, when

committed in doing what he was entrusted to do, (*Hern vs. Nichols*, 1 Salk. 289; Story on Agency, §§ 452–454); and also upon the ground that a principal, by adopting a contract made for him, and receiving and retaining the fruits as belonging to him by virtue of that contract, assumes responsibility for the instrumentalities which the agent may have employed in his behalf to effect the contract. (*Veazie vs. Williams*, 8 How. U. S. 134; *Bennett vs. Judson*, 21 N. Y. 238; *Elwell vs. Chamberlain*, 31 Id. 611.)

It must be observed, however, that even this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the authorized contract, and the principal retain the proceeds thereof after knowledge of the fact. (*Smith vs. Tracy*, 36 N. Y. 79; and see *Hammond vs. Michigan State Bank*, Walker's Ch. R. 214; *Young vs. White*, 7 Beav. 506.) A party dealing with an agent is bound to enquire as to the extent of his authority; but he cannot always protect himself against his frauds.

The cases in which it is held that, if the principal ratifies and enjoys the benefit of a part of a contract he cannot repudiate the rest, refer to an intentional ratification, with knowledge of all that has been done. (Story on Agency, § 250; *Farmer's Loan & Trust Co. vs. Walworth*, 1 N. Y. 434; *Smith vs. Tracy*, 36 N. Y. 79; Dunlap's Paley, 172, 173.)

But this case does not come within the principle of any of those cited. Here, according to defendants' version of the facts, the acts of Blanchard were not done as the means of accomplishing anything which he was authorized by the defendants to perform as their agent, nor were the sums paid received by them as the fruits of any contract made in their behalf and which they adopted, but upon an independent dealing between them and Blanchard, and as his money raised on his own credit and their goods.

The judgment cannot be sustained, on the ground that the evidence justified the direction of a verdict for the plaintiffs; and it must therefore be reversed, and a new trial ordered, with costs to abide the event.

(113 MASSACHUSETTS, 291, 18 AM. REP. 480.)

THACHER vs. PRAY.

(Supreme Judicial Court of Massachusetts, October, 1873.)

One Gray had in his possession a horse belonging to the plaintiff Thacher. Gray also owed Thacher for potatoes sold to him by the latter. Gray wrongfully sold the horse to defendant Pray, receiving in payment the satisfaction of a debt which he owed Pray, and also a cashier's check or draft for $100. Gray wrote to Thacher about his indebtedness for the potatoes, enclosing this check and saying: "I send you a check for one hundred dollars. Please credit me for the same." He said nothing about the sale of the horse. When Thacher discovered that the horse had been sold, he demanded its return of Pray, but the latter refused unless Thacher returned the check or its proceeds, which Thacher declined to do. Thacher then brought this action to recover the horse or its value.

Thacher asked the court to charge the jury that if Gray sent him this check to be applied on account of the potatoes, and Thacher so received and applied it before he knew of the sale of the horse, the mere fact that it was the same check that Pray gave Gray for the horse was of no consequence, and that Thacher's receipt and application of the check would not, under the circumstances, amount to a ratification of the sale of the horse, nor was he obliged to return the check to Pray before bringing this suit. The court declined so to charge, and instructed the jury, in substance, that Thacher's retention of the check after he knew of its origin would bar the action and amounted to a ratification of the sale. Verdict for defendant, and plaintiff alleged exceptions.

W. H. Fox, for plaintiff.

H. J. Fuller (E. H. Bennett with him), for defendant.

ENDICOTT, J. The instructions upon which this case was given to the jury failed to notice an important portion of the evidence. If the only dealings between the plaintiff and Gray related to this horse, and the money paid for the horse by the defendant to Gray, who had no authority to sell, had been sent to the plaintiff, the taking and keeping it might be a ratification of the sale by Gray; or, if the plaintiff had wished to rescind it, he should return the money so received. But the evidence in the case required other

and further instructions. It appeared that the plaintiff had sent potatoes to Gray for sale, and there was evidence tending to show that the check for $100, taken by Gray on account of the wrongful sale of the horse, was paid over to the plaintiff, received by him, and accredited on account of the potatoes, and the plaintiff did not know that the horse had been sold for a long time afterward. These facts justify the plaintiff's prayer for instructions, and we think they should have been given. It does not affect the rights of the parties that the same check which defendant gave Gray was given to the plaintiff, if it was applied to the settlement of an existing account between them, without any notice that it was a part of the proceeds of the unauthorized sale of the horse. Being indorsed by Gray, it was in the plaintiff's hands payable to bearer, transferable by delivery, and subject to the same rules as bank bills, coupons, or other instruments payable in money to bearer. *Spooner vs. Holmes*, 102 Mass. 503, 3 Am. Rep. 491. It is as if Gray had cashed the check and sent the identical or other bills to the plaintiff.

It was held in *Lime Rock Bank vs. Plimpton*, 17 Pick. 159, 28 Am. Dec. 286, where an agent had lent the money of his principal to his private creditor, who appropriated it to the payment of the debt, that the principal could not recover it, the creditor not knowing at the time of the loan that the money belonged to the principal. The creditor had the right to secure his private debt, and being money having no ear mark, it did not stand on the same ground as chattels. A party is not bound to inquire into the authority of a person from whom he receives money in payment of a debt, for a different doctrine would be productive of great mischief. In that case as in this, there was no privity between the parties, and the equities were much stronger than here.

Exceptions sustained.

VI.

THE RESULTS OF RATIFICATION.

1. *Between Principal and Agent.*[1]

(13 BUSH, 526, 26 AM. REP. 211.)

BANK OF OWENSBORO vs. WESTERN BANK.

(Kentucky Court of Appeals, September, 1877.)

Plaintiff bank requested defendant bank to loan some money for it on good notes. Defendant therefore loaned $5,000 to one Atwood on his note secured by stock of the Bank of Louisville. That bank claimed a lien on the stock, of which defendant informed plaintiff, but also informed plaintiff that the Bank of Louisville had agreed to release the lien. On this information, plaintiff accepted the note and the stock as collateral, but, having brought suit against the Bank of Louisville to compel a transfer of the stock, was defeated, and the lien of the Louisville bank was held prior to plaintiff's. Atwood, in the meantime, had failed, and plaintiff not being able to collect from him, brought this action against defendant, charging it with negligence in making the loan. Judgment below for defendant, and plaintiff appealed.

James S. Pirtle, G. W. Caruth and *Thomas Speed,* for appellant.

Muir, Bijur & Davie, for appellee.

COFER, J. (After stating the facts). The only grounds urged for a reversal is, that the court erred in instructing the jury in respect to the alleged ratification. The evidence showed, without contradiction, that before the appellant received the note and collaterals, and brought suit against Atwood and the Bank of Louisville, it knew that the latter claimed a lien on the stock pledged to secure Atwood's note for an amount exceeding its value. But also showed that the appellee's cashier informed the appellant, that before the loan was made the Bank of Louisville agreed to release its lien, or, what was the same thing, to transfer the stock on its books into appellant's name.

That the appellee's cashier knew, before he made the loan, that the Bank of Louisville had a lien on its stock for debts due the bank by the holders thereof, and that Atwood was then indebted to the bank

[1] See also *Hazard vs. Spears, ante,* p. 182.

in a sum greatly exceeding the value of the stock, was not at any time disputed, the sole matter in dispute being whether it had agreed to waive its lien when called on by Hurter before he made the loan. That question was never finally settled until the judgment in favor of the Bank of Louisville was rendered.

Upon this evidence the court instructed the jury that if the appellee fairly and fully communicated to the appellant all the facts and circumstances connected with the loan *which were known to the appellee or its agent, Hurter,* and that the appellant knew of the insolvency of Atwood and the claim asserted by the Bank of Louisville and thereafter adopted the transaction, and received the note and collaterals and treated them as its own, the law was for the appellee, although it might have been guilty of such negligence as would otherwise have rendered it liable.

The doctrine that if an agent has, by a deviation from his orders, or by any other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions by the principal, if made with a full knowledge of all the facts, is elementary. But the instructions given in this case went further, and held that if the principal, at the time of accepting the note and collaterals, knew all the facts touching the loan and affecting the value of the security, *which were then known to the agent,* and with such knowledge received them and treated them as its own, the agent was discharged from liability. We have examined many authorities, both elementary and judicial, in which the doctrine of ratification, as between principal and agent, is discussed, but we have not found one which considered the good faith of the agent as an element in deciding whether or not there had been a ratification; but, on the contrary, whenever the good faith of the agent has elicited remarks, it has been to the effect that it could have no weight in the decision of this question. "Indeed, in all such cases the question is not whether the party (agent) has acted from good motives and without fraud, but whether he has done his duty and acted according to the confidence reposed in him." Story on Agency, sec. 192.

Nor do we find any authority for exonerating a delinquent agent from liability if he communicates to the principal all the facts known to him at the time, and the principal ratifies the delinquency, and it afterwards turns out that the facts as communicated were not the real facts of the case. In such a case the assumed condition is not that claimed to have been ratified.

It was the duty of the appellee to loan appellants money on good security, or such as a person of common prudence and skill in business would have esteemed good. It did loan it upon a security confessedly sufficient if unincumbered, but which, as the event has proved, was incumbered to its full value, and therefore was no security at all. The appellee, through its cashier (for whose acts we assume for the present it was liable), represented that the stock was not in lien to the Bank of Louisville; in other words, that the security was good. To know whether the representation was true was necessary to enable the appellant to make an election. It is true it knew that the Bank of Louisville asserted a lien, but whether that lien was superior to the appellant's, or had been waived as appellee represented, it did not and could not know until the dispute was settled.

We have, therefore, a case in which, when the alleged ratification was made, both the principal and agent were necessarily ignorant of the most material fact in the whole case, and consequently there could not have been such a ratification as would release the agent from liability if its conduct had been such that it was otherwise liable. The gravamen of the appellant's complaint is, that the appellee negligently failed to take sufficient security for the loan; and the defense is, that the alleged negligence has been ratified; and yet the uncontradicted evidence is, that at the time of the supposed ratification it was not known that there had been the slightest negligence or that the security was insufficient. It was not the act of making the loan that needed to be ratified; that was expressly authorized. Nor did the acceptance of the bank stock as security need ratification.

The stock was confessedly worth more than the loan. That which needed ratification was the acceptance of the stock *subject as it was to the lien of the Bank of Louisville* as security for the loan. If, as the appellee affirmed, it was not subject to the asserted lien, there had been no negligence, and there was nothing to ratify. Whether it was subject to that lien was never known until the suit to test the question was *decided;* and then, and not until then, did the appellant obtain a knowledge of the facts necessary to make an election whether to adopt or repudiate the acts of its agents.

We have found no case, the facts of which are sufficiently like the facts of this, to make the decision rendered a controlling precedent in this case; but assuming the two fundamental rules of

the law of agency, (1) that when the agent has deviated from his duty he becomes liable to his principal for such losses as are the direct and natural consequence of such deviation, whether his motives were good or bad; and (2) that he is only released from that liability when the principal, with a knowledge of all the facts, ratifies his departure from his duty, and we think there can be no doubt of the correctness of the conclusion we have reached.

There was not only no evidence that the appellant knew at the time of the alleged ratification that the appellee had taken insufficient security, but, on the contrary, the evidence was uncontradicted and conclusive that it did not, and there was therefore no evidence upon which to base an instruction on the subject of ratification.

None of the cases cited by appellee's counsel are like this. We cannot undertake to review them one by one, and point out the distinction between them and this case; but an examination of them will show that in every one in which the agent was held to be discharged from liability for deviations from orders or duty, the principal knew at the time of the ratification that the agent had not done his duty, whereas, in this case, as we have already seen, the appellant did not and could not know that the appellee had not taken ample security until it was decided that the Bank of Louisville had not waived its lien on the stock. This conclusion is sustained by the cases of *Bank of St. Marys vs. Calder*, 3 Strobh. 403; *Walker vs. Walker*, 5 Heisk. 425; and by Wharton on Agents and Agency, § 67.

(Omitting a point decided not to be in issue.)

If, in view of the character and standing of Atwood at the time the loan was made, the knowledge the appellee (or, what is the same thing, its cashier) had of the lien on the collaterals given to the Bank of Louisville by its charter, what took place between the appellee's cashier and the officers of the Bank of Louisville, and his information as to Atwood's indebtedness to it, the loan would not have been made on the security taken by a person of ordinary prudence and skill in banking, the appellee is liable, otherwise it is not.

Judgment reversed, and cause remanded for a new trial upon principles not inconsistent with this opinion.

To the petition of counsel for appellee for a rehearing, Judge COFER delivered the following response of the court:

We have carefully re-examined the grounds upon which the

opinion already delivered herein is based, and the authorities relied on by the learned counsel for the appellee to show that the conclusion then reached was erroneous, but have failed to detect any error in the reasoning by which we reached that conclusion, or any conflict between the opinion and the cases cited by counsel. We have, however, concluded that one portion of the opinion was not necessary to a decision of this case, and it has been stricken out. We said in the opinion that we could not undertake to review all the cases cited by counsel, and point out the distinction between them and this case, and therefore contented ourselves with saying that there was such a distinction. In the petition counsel have cited only a portion of the cases cited on the hearing, and we deem it due to them, as well as ourselves, to indicate the distinction between those cases and this case. The cases cited are *Courcier vs. Ritter*, 4 Wash. 549; *Cairnes vs. Bleeker*, 12 Johns. 300; *Pickett vs. Pearson*, 17 Vt. 470; and *Hanks vs. Drake*, 49 Barb. 202.

The facts in *Courcier vs. Ritter* were these: In October, 1812, Ritter, a merchant of Philadelphia, consigned to Courcier, a merchant of Bordeaux, forty bags of coffee, with instruction to sell immediately on arrival, and forward to him by the same vessel the articles mentioned in the letter of advice. The coffee was not landed until March, 1813, but Courcier had previously written that as soon as it was landed he should use his best endeavors to effect an advantageous sale, and would ship by the return of the vessel the articles ordered. April 28 he again wrote to Ritter as follows: "I have not been able yet to procure a sale of your coffee, but no exertions will be wanted to avail myself of the first favorable change in the market." Courcier did not again write to Ritter until May 21, 1815, when he inclosed an account of sales, by which it appeared that the coffee had not sold for enough to reimburse the advance made by the shipment of articles ordered by Ritter, and the suit was brought to recover the balance due thereon. Ritter defended on the ground that his instructions to sell *immediately* had not been obeyed, and he had been damaged by the holding of the coffee by Courcier; to which Courcier replied, that by accepting the return cargo (which was procured by an advance made by him, and was not purchased with the proceeds of the outward cargo), and by not promptly objecting to the alleged violation of his orders, of which the letter of April 28 informed him, Ritter had ratified what was done.

In considering this part of the defense, Mr. Justice WASHINGTON said: "If the principal, being informed by his agent of the deviation from his orders, makes no objection to his conduct, the law construes his silence into a tacit recognition of the act or omission, against which he will not be permitted afterwards to complain. The reason is obvious. He shall not by his silence place his agent in the predicament of losing all the gain which *may result* from his well-intended disobedience, and yet be exposed to sustain the loss which a mistaken judgment or unforseen circumstances *may produce.*"

This principle we recognize fully. "If," says the learned judge, "the principal, being *informed by his agent of the deviation from his orders* makes no objection to his conduct. the law construes his silence into a tacit recognition," etc. But suppose he, as the appellee did in this case, fails to notify his principal that he has deviated from his orders, what, then, does the law imply from the silence of the principal? The same learned judge, in the same case, referring again to the letter of April 28th, says: "He does not say that he has declined selling on account of the low price of coffee, which would subject his correspondent to a loss, but that the sale of it is impracticable. * * * He discloses no breach of orders whatever, if the fact was that no sales could be made; and consequently the defendant's silence *had no known violation of duty to recognize* or ratify."

Such is precisely the case here. The appellee did not disclose that it had violated its orders, but affirmed that it had not, and "there was no known violation of duty to recognize or ratify."

Cairnes vs. Bleeker is a very long case, but may, for the purposes of this case, be briefly stated as follows: Bleeker received from Cairnes certain goods marked M. Gillett, and was instructed to deliver them to Gillett whenever he deposited with him (Bleeker) property amply sufficient to secure certain drafts drawn by Gillett on Bleeker in favor of Cairnes. In July, after the goods were deposited with Bleeker, he wrote to Cairnes, informing him that a certain quantity of ashes had been deposited by Gillett to secure the drafts, and that the goods received for Gillett had been delivered to him. The ashes then held by Bleeker seem to have been understood by both parties not to be "amply sufficient to secure the drafts," for in the same letter, informing Cairnes of the delivery of the goods to Gillett, he was notified that Gillett promised

more ashes by the next trip of the vessel by which the first lot was shipped.

In October Cairnes wrote to inquire of Bleeker what other property, besides the ashes shipped as above stated, Gillett had placed in his hands when he took away the last of the goods. November 1st Bleeker informed Cairnes that Gillett had deposited no property besides the ashes already shipped. On the 12th of the following February Cairnes informed Bleeker by letter that he should look to him for the value of the goods left with him, and which he, in violation of his instructions, had delivered to Gillett without the required deposit of "property amply sufficient to secure the drafts." That letter was not answered, and August 3d following, formal demand was made upon Bleeker for the goods, which he refused to deliver.

In commenting on these facts the court said: "On the 18th of July, 1811, the defendant informed the plaintiff that he had, on the 17th day of that month, delivered to Gillett the last parcel of the goods, and that he (defendant) had received from him twenty-six casks of ashes. * * * The plaintiff rests satisfied until October the 29th, and then, for the first time, asks for information what other property Gillett had placed in his hands when he took the last of the goods." The duty and instructions of Bleeker were not to deliver the goods to Gillett until he should deposit with him "property amply sufficient to secure the drafts." Those instructions were violated, and Cairnes was distinctly informed of the fact by letter dated July 18, and with that information he remained silent until October 29. It was held he could not recover.

The statement of facts in *Pickett vs. Pearson* is very long; but the point decided in the case may be shown by the following statement: The defendant undertook to collect money for the plaintiff who resided in Vermont, from debtors residing in the then territory of Wisconsin, and was instructed to receive from one of them only gold and silver or bank-notes at par in Vermont; but the defendant disobeyed his orders, and received for a portion of the debt bank-bills not worth more than twenty cents on the dollar, and for the residue he took the note of the debtor. On his return he delivered the bills and note to the plaintiff, who said he did not know the value of the bills, but would see what he could do with them. He received them November 14, and during the ensuing winter learned they were worth only twenty cents on the dollar,

and as soon as he ascertained their value he notified the defendant, and requested him to make up the money as good as the plaintiff had instructed him to receive, but he did not offer to return the bills until after he had sued the defendant, and it does not appear that he ever offered to return the note of hand taken by the defendant for a part of the debt. The defendant at the time of receiving the bank-bills from Chickering, the debtor, took from him a guaranty with surety that the bills were good, and that also was delivered to the plaintiff with the bills, and was retained by him until after suit was commenced.

In commenting on the facts, the court said: "It seems very plain to us that the plaintiffs taking the money and guaranty, and keeping them for months, fully exonerated the defendant. The plaintiff received of the defendant all that the defendant received of Chickering, and all that belonged to him, under protest, to be sure, that he would see what could be done with the money. How long a time is to be allowed him to ascertain that fact? It could hardly be pretended that two or three months were necessary to ascertain that fact. It could just as well be done in as many weeks, and very likely in as many days."

The case was made to turn upon the delay to return the bills after the plaintiff had learned they were not such as he had directed to be received. He knew then that his instructions had been violated, and then, and not until then, or until he might, by proper diligence, have learned the fact, did he become bound by a ratification.

The case of *Hanks vs. Drake* is thus correctly stated by counsel: "The principal employed the agent to sell stocks for him at a particular time. The agent sold them prematurely, whereby loss was occasioned to the principal. The agent rendered an account to the principal of what he had done. The principal remained silent for four months, then received the proceeds of the sale, and sued the agent for damages for the difference.

"The court held that the right of action was lost by ratification, saying: 'When they sold the stock and rendered the account, it was the duty of the plaintiff to have dissented at once. Had the plaintiff so dissented, the defendant could have replaced the stock without loss,' and saying further: 'The plaintiff, however, claims that such acts are not a ratification unless he had full knowledge of his rights. I do not understand such to be the rule; but the party must have full knowledge of the facts and circumstances of

the transaction.'" Here was four months of silence after the principal knew his instructions had been violated.

It thus appears that between each of the cases cited in the petition (and we assume they are as pertinent as any counsel have been able to quote) and the case at bar there is the clear and marked distinction that in the former the principal knew at the time of the alleged ratification that his instructions had been disobeyed, while in the latter the principal not only did not know that his orders had not been obeyed, but the agent insisted there had been no disobedience. (Omitting another point not in issue.)

But we are referred to our opinion in *Trigg vs. The Second National Bank*, as inconsistent with the opinion in this case. The following extract from the opinion in that case will be sufficient to distinguish it from this and to show that it belongs to the same class with the cases cited by counsel, and which we have just reviewed. We said: "The evidence showed that the note was delivered to appellants in December, and that they then knew the facts in regard to the financial condition of the parties to the note and the value of the collaterals." In other words, the appellants in that case knew, when they accepted the securities taken by the appellee, the value of those securities, and if their agent had deviated from its duty, they then knew the facts.

The petition must be overruled.

NOTE.—See, also, *Walker vs. Walker*, 5 Heisk. (Tenn.) 425; *Rathbun vs. Steamboat Co.*, 76 N. Y. 376, 32 Am. Rep. 321; *Trigg vs. Jones*, 46 Minn. 277. In the case last cited the court said: "There is no doubt that the general rule is that, by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and that thenceforward the principal assumes the responsibility of the transaction, with all its advantages and all its burdens. Neither is there any question but that, where the rights and obligations of third persons may depend on his election, the principal is bound to act and give notice of his repudiation or disaffirmance of the unauthorized act at once, or at least within a reasonable time after knowledge of the act, and, if he does not so dissent, his silence will afford conclusive evidence of his approval. Such a rule is necessary to protect the rights of third parties who have dealt with the agent. If the principal, after knowledge, remains entirely passive, it is but just, when the protection of third parties require it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly confirmed. But it is apparent that the reasons for such a rule do not apply with equal force in favor of the agent himself, who has wrongfully committed the unauthorized act. Consequently mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in

favor of the agent, so as to absolve him from liability to his principal for loss or damage resulting from the unauthorized act, especially if such inaction or failure to immediately disaffirm was induced by the assurances or persuasion of the agent himself. Nor in this case does the affirmative action of the plaintiff, after knowledge of the delivery of the deed, in taking part in the preliminary steps for the organization of the contemplated stock company, of itself amount to a ratification of the unauthorized act. Such steps were right in the line of the original agreement between the parties and were designed to carry it into effect, induced, as such action probably was, by the assurances of Jones (the agent) that the enterprise would still go on, and plaintiff get his stock, it really amounted to nothing more than an effort on plaintiff's part, after knowledge of Jones' deviation from his instructions, to avoid loss thereby, which is not such a ratification as will relieve the agent. Mechem, Ag. § 173. Upon proof that Jones' act was without original authority, the burden was upon him to show such a subsequent ratification as would relieve him from liability. The court has not found any such ratification, and, in our opinion, under the evidence, he was justified in finding, as he in effect does, that there was none."

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2. *Between Principal and the Other Party.*

(14 WISCONSIN, 686.)

DODGE vs. HOPKINS.

(Supreme Court of Wisconsin, June, 1861.)

This was an action to recover installments due upon a written contract under seal by which Dodge had agreed to sell Hopkins certain lands which the latter agreed to buy and pay for in given installments, one of which was paid to the agent at the date of the contract. The contract was executed on the part of Dodge by an agent who assumed to act under a letter of authority from Dodge and his wife which had been executed in Spain. It was objected on the trial that the power of attorney was not so executed as to authorize the act of the agent. There was no evidence that defendant had at any previous time sought to repudiate the contract on this ground, but he sought to file a supplemental answer showing that since the commencement of suit he had tendered the money to an alleged agent of plaintiff and demanded the deed agreed upon. The supplemental answer was rejected. Judgment for plaintiff and defendant appealed.

J. C. Hopkins, for appellant.

Abbott, Gregory & Pinney, for respondent.

DIXON, C. J. (After deciding that the supplemental answer was properly rejected because it did not appear that the agents had authority to accept the money or make the conveyance, and that the power of attorney was not sufficient to authorize the agent to execute the contract on the part of the plaintiff because as the power from Dodge and his wife was joint, it did not authorize a sale of the separate property of Dodge alone.) We are next to ascertain the effect of this want of authority upon the rights of the defendant. It is very clear, in the present condition of the case, that the plaintiff was not bound by the contract, and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual—those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound—that each should execute the instrument so that the other could set it up as a binding contract against him, at law as well as in equity, from the moment of its execution.

In such cases it is well settled, both on principle and authority, that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. *Townsend vs. Corning,* 23 Wend. (N. Y.) 435; and *Townsend vs. Hubbard,* 4 Hill, (N. Y.) 351, and cases there cited. The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it, can render it obligatory upon the party who did execute, without his assent. The opinion of Judge BRONSON in the first named case is a conclusive answer to all arguments to be drawn from the subsequent ratification of the party who was not originally bound. In that case, as in this, the vendors had failed to bind themselves by the agreement. He says: "It would be most extraordinary if the vendors could wait and speculate upon the market, and then abandon or set up the contract as their own interests might dictate. But without any reference to prices, and

whether the delay was long or short, if this was not the deed of the vendee at the time it was signed by himself and Baldwin (the agent), it is impossible that the vendors, by any subsequent act of their own without his assent, could make it his deed. There is, I think, no principle in the law which will sanction such a doctrine." The only point in which the facts in that case differ materially from those here presented, is that no part of the purchase money was advanced to the agent. But that circumstance cannot vary the application of the principle. The payment of the money to the agent did not affect the validity of the contract, or make it binding upon the plaintiff. He was at liberty to reject the money, and his acceptance of it was an act of ratification with which the defendant was in no way connected, and which, although it might bind him, imposed no obligation upon the defendant until he actually assented to it. It required the assent of both parties to give the contract any vitality or force.

I am well aware that there are dicta and observations to be found in the books, which, if taken literally, would overthrow the doctrine of the cases to which I have referred. It is said in *Lawrence vs. Taylor*, 5 Hill, (N. Y.) 113, that "such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before." And in *Newton vs. Bronson*, 3 Kern. (N. Y.) 594 (67 Am. Dec. 87), the court say: "That a subsequent ratification is equally effectual as an original authority, is well settled." Such expressions are, no doubt, of frequent occurrence, and although they display too much carelessness in the use of language, yet if they are understood as applicable only to the cases in which they occur, they may be considered as a correct statement of the law. The inaccuracy consists in not properly distinguishing between those cases where the subsequent act of ratification is put forth as the *foundation of a right in favor* of the party who has ratified, and those where it is made the basis of a demand *against* him. There is a broad and manifest difference between a case in which a party seeks to avail himself, by subsequent assent, of the unauthorized act of his own agent, in order to enforce a claim against a third person, and the case of a party acquiring an inchoate right against a principal by an unauthorized act of his agent, to which validity is afterwards given by the assent or recognition of the principal. Paley on Agency, 192, note. The principal in such a case may, by his subsequent assent, bind himself, but, if the contract be executory, he cannot bind the other

party. The latter may, if he choose, avail himself of such assent *against* the principal, which, if he does, the contract, by virtue of such *mutual* ratification, becomes *mutually* obligatory. There are many cases where the acts of parties, though unavailable for their own benefit, may be used against them. It is upon this obvious distinction, I apprehend, that the decisions which I have cited are to be sustained. *Lawrence vs. Taylor* and *Newton vs. Bronson* were both actions in which the *adverse* party claimed rights through the agency of individuals whose acts had been subsequently ratified. And the authorities cited in support of the proposition laid down in the last case (*Weed vs. Carpenter*, 4 Wend. [N. Y.] 219; *Episcopal Society vs. Episcopal Church*, 1 Pick. [Mass.] 372; *Corning vs. Southland*, 3 Hill, [N. Y.] 552; *Moss vs. Rossie Lead Mining Co.*, 5 Id. 137; *Clark vs. Van Riemsdyk*, 9 Cranch. [U. S.] 153; *Willinks vs. Hollingsworth*, 5 Wheat. [U. S.] 241), will, when examined, be found to have been cases where the subsequent assent was employed against the persons who had given it, and taken the benefit of the contract. * * *

Reversed.

NOTE.—Compare this case with the two following. This case has been followed in later Wisconsin cases. See *Atlee vs. Bartholomew*, (1881) 69 Wis. 43, 5 Am. St. Rep. 103, and note. See also 24 American Law Review, p. 580.

In *Yerkes vs. Richards*, (1893) 153 Penn. St. 646, it is held that an agreement to sell land at the option of the vendee is not rendered void for want of mutuality because the vendee was a *feme covert*, and the agent who contracted for her had no authority to bind her thereby; and on election and offer of performance by such vendee the contract will be enforced against the vendor. *Corson vs. Mulvaney*, 49 Pa. St. 88, followed.

Notice to quit, given by one assuming to act as agent for another, but having no authority, cannot be ratified after the time when the notice is to operate, so as to lay the foundation for summary proceedings under the landlord and tenant act. *Pickard vs. Perley*, (1864) 45 N. H. 188, 86 Am. Dec. 153; *Brahn vs. Jersey City Forge Co.*, 38 N. J. L. 74; *Right vs. Cuttrel*, 5 East. 491; *Doe vs. Walters*, 10 B. & C. 625; *Doe vs. Goldwin*, 2 Q. B. 143. *Contra: Roe vs. Pierce*, 2 Camp. 96; *Goodtitle vs. Woodward*, 3 B. & Ald. 689.

(146 Pennsylvania State, 144, 28 Am. St. Rep. 785.)

McCLINTOCK vs. SOUTH PENN OIL COMPANY.

(Supreme Court of Pennsylvania, January, 1892.)

One Donaldson entered into a written contract to sell to the plaintiff, Mattie M. McClintock, certain real estate therein described on terms therein stated. Afterwards her husband agreed to transfer the contract to the defendant for $1,150, and he indorsed upon the contract a receipt as follows:

Pittsburgh, Pa., December 23, 1889.

Received of the South Penn Oil Company, fifty dollars of the purchase money for the within contract. The balance to be paid by 26th, on making the necessary transfer, is to be eleven hundred dollars. Mattie M. McClintock,

By Alex. McClintock.

On December 26, defendant endorsed on the contract the necessary writing for a formal transfer of it, and requested it to be properly executed and returned the next day, when the money would be paid. The transfer was properly executed by McClintock and wife, and tendered to defendant, but defendant refused to accept it and pay the $1,100, unless McClintock would get Donaldson to make certain alterations in the contract. McClintock tried to have this done, but Donaldson refused. Plaintiff then offered to return to defendant the fifty dollars paid on the date of the receipt, and requested defendant to cancel the assignment, but this defendant refused to do, and notified Donaldson that it held the contract by assignment. Plaintiff not receiving the payment from defendant, was not able to pay to Donaldson a payment due soon after, and lost her rights under the contract. She brought this action for damages, and recovered. Defendant appealed.

Boyd Crumrine, Henry McSweeney, Charles M. Thorpe and *E. E. Crumrine,* for the appellant.

R. W. Irwin, John W. Donnan, A. Donnan, and *M. C. Acheson,* for the appellee.

Mitchell, J. The receipt by plaintiff's husband expressed the fact of a sale, by the acknowledgement of receipt of part of the purchase money, and fixed the time and amount of the remaining payment. All the other terms of the contract, including the

identification of the subject matter, were shown by the original agreement of Donaldson, on which the receipt was indorsed. The two papers thus constituted one instrument, which, so far as appears on its face, was a sufficient memorandum in writing to satisfy the statute of frauds. Its defect in that regard was *dehors* the instrument itself, and lay in the want of written authority in the husband to act as agent for his wife. Had his authority been in writing at that time, even though on a separate paper, no question of the validity and binding force of the contract could have arisen. His action as agent was, however, formally ratified and adopted by the wife in writing before any rescission or change of position in any way by the defendant.

The exact question before us, therefore, is whether such ratification by the wife, of its own force, perfected and validated the agent's original contract, or whether it still required acceptance by the grantee.

No case precisely in point has been found, and we are left to determine the question on general principles. It is conceded that a deed tendered by the vendor, but refused by the vendee, will not validate a parol contract, and it is argued that the present case stands upon the same footing. But I apprehend that the rule in question results from the common-law requirement that every writing must be accepted before it becomes a contract.

It is sometimes said, however, that the reason a deed tendered is ineffectual under the statute is, that until such tender the vendor was not bound; the vendee could not have held him, and there being, therefore, a want of mutuality in the agreement, equity will not specifically enforce it. Whether the equitable doctrine of mutuality has any proper place in cases arising under the statute of frauds is a vexed question on which our decisions are not in harmony, and are badly in need of review and authoritative settlement. See *Tripp vs. Bishop*, 56 Pa. St. 424; *Meason vs. Kaine*, 63 Pa. St. 335; *Sands vs. Arthur*, 84 Pa. St. 479; and the comment upon them by Judge REED in his treatise on the statute of frauds, sec. 367. But whatever the foundation of the rule, it is doubtful if the case of ratification of an agent's act comes fairly within it. If the agent had been properly authorized, the contract would have bound both parties in the first instance, and the settled rule is that ratification is equivalent in every way to plenary prior authority. The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority,

actual and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist; but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late. The contract is complete.

If, in the present case, the defendants had written a letter to plaintiff stating that they had made the agreement with her husband as agent, but that his authority not being in writing, they requested her to send them a written ratification, and thereupon she had written and mailed an acceptance and ratification of her agent's act, there could be no question of the contract. *Hamilton vs. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339, and cases cited in 3 Am. & Eng. Ency. of Law, 856, tit. "Contract;" and 13 Am. & Eng. Ency. of Law, 233, tit. "Mail." And, in effect, that is just what the defendant did here. It made the original agreement with the husband, evidenced by his indorsement on the Donaldson contract, which was delivered into its possession. On the day that payment was called for by the indorsed agreement, the defendant further indorsed on the contract an assignment by husband and wife, which would be a written ratification of the most formal kind of the husband's previous act, and, as the jury have found, delivered it to the husband unconditionally for execution and acknowledgment. The defendant's consent to the contract sued upon was thus manifested; and upon acceptance by plaintiff, the contract became binding as a common-law contract of both parties, and upon her signature it became a contract in writing within all the requirements of the statute. The objects of the act, certainty of subject matter, precision of terms, reliability of evidence, and clearness of intent of the land owner, are all secured, and we see no particular in which either the letter or the policy of the statute has been violated.

The cases cited by appellee, though not decisions on the precise point, tend to sustain the conclusion here reached: *Maclean vs. Dunn*, 4 Bing. 722, was under the English statute, which requires only that the agent should be "lawfully authorized;" but the opinion of Lord Chief Justice Best illustrates the effectiveness of ratification as equivalent to antecedent authority. In our own

case of *McDowell vs. Simpson*, 3 Watts, 129, 27 Am. Dec. 338, the opinion of KENNEDY, J., is clearly expressed that a lease by an agent in excess of any authority, either parol or written, may be ratified, but the ratification to create a valid term for seven years must be in writing. So far as the case goes, it is directly in line with our present conclusion, and it has never been questioned, but on the contrary is cited with approval in *Dunn vs. Rothermel*, 112 Penn. St. 272.

This disposes of the main question in the case, and with it the exceptions relating to the measure of damages fall. The plaintiff recovered only the contract price, to which she was entitled. * * *

Judgment affirmed.

NOTE.—See preceding and following cases and notes.

(LAW REPORTS, 41 CHANCERY DIVISION, 295.)

BOLTON PARTNERS vs. LAMBERT.

(English Supreme Court of Judicature, Court of Appeals, March, 1889.)

This was an action in the Chancery Division brought by Bolton Partners, an incorporated company, against Lambert to enforce the specific performance of an agreement to take a lease of certain premises. On the 8th of December, 1886, Lambert wrote to one Scratchley, who was then acting as managing director of the plaintiff company, offering to take the premises upon conditions stated in his letter. Scratchley wrote to Lambert on the 9th acknowledging the receipt of the offer, and saying that he would refer it to the directors. On December 13, the "works committee" decided to accept the offer and that Lambert should be so notified. On that day Scratchley wrote to Lambert saying that his offer had been accepted, and that the company's solicitor had been instructed to prepare the papers.

It was admitted that the "works committee" had no authority to accept the offer or to bind the company to carry out its part of the agreement.

On December 17, the plaintiff's solicitor sent defendant a draft of the agreement, but objection was made by the defendant to cer-

tain provisions, and, after some correspondence, the defendant, on January 13, 1887, wrote to plaintiff withdrawing his offer, on the ground that he had been misled by statements made to him as to the value of the property. On January 17 the writ in this action was issued by order of the board of directors, and on January 28 the board of directors formally confirmed the action of the "works committee" and Scratchley's letter of acceptance.

The defendant denied that there had been any complete contract; and contended that after he had repudiated his offer it was too late for the company to ratify Scratchley's acceptance. He also relied on misrepresentation.

The action came up before Mr. Justice KEKEWICH on the 19th of December, 1888, and he decreed specific performance, saying among other things, after finding that the letters made a complete contract and that there was no misrepresentation:

"It is said that the contract cannot be enforced on the ground of want of mutuality, that is, that inasmuch as the company were not bound at any time before the 13th of January, 1887, Mr. Lambert cannot now be compelled to perform the contract he had entered into with them through their unauthorized agent. As regards the doctrine of mutuality, I have had to consider it many times. I am always afraid of quoting my own decisions. I do not think it is the right thing for a judge to do, but I often do refer to them when I can thereby avoid repeating in different words what I have said before. I see that in the case of *Lee vs. Soames*, 36 W. R. 884, I did refer to the doctrine, and to the cases on the subject, and I did so even more fully in the case of *Wylson vs. Dunn*, 34 Ch. D. 569, 576, 577, where my view of the doctrine of mutuality is stated with express reference to the judgments of the Master of the Rolls in *Forrer vs. Nash*, 35 Beav. 167, and Lord Justice FRY in *Brewer vs. Broadwood*, 22 Ch. D. 105. But the question here is, what is the value of want of mutuality as regards a case of this kind. Why should Mr. Lambert be now entitled to get off his bargain because at that time the company was not strictly bound? Mr. Lambert does not seek to get off his bargain on that account. He repudiates it on entirely different grounds, and long before he set up this point of *ultra vires* the company had adopted the contract made on their behalf and had taken proceedings, and had waived any right they might have had as against him to resist specific performance of it if he had taken proceedings. On what possible ground therefore can he now complain that he is compelled to per-

form a contract which he had entered into with the plaintiffs? The contract was with them. It seems to me an entirely different case from those where the original contracting party was incapable of performing. The company were capable, I so hold, from the very first, and immediately they come forward and adopt the bargain, the original alleged incapacity is completely set right by their waiver. Then comes in, it seems to me, * * * the doctrine of ratification. The doctrine of ratification is this, that when a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party. That doctrine, combined with the one in respect of mutuality, the limits of which I have already stated, seems to me to get rid entirely of the third objection on the ground of *ultra vires*, and to dispose of this case. There must, therefore, I think, be judgment for specific performance."

From this judgment the defendant appealed. The appeal came on for hearing on the 15th of March, 1889, before COTTON, LINDLEY and LOPES, L. JJ., all of whom rendered opinions.

Bros, Q. C. and *Abbott*, for appellant.

Warrington, Q. C. and *Chadwyck Healey*, for plaintiff.

COTTON, L. J. (After disposing of the objection that there was no contract entered into by the letters.) But then it is said that on the 19th of January, 1887, the defendant entirely withdrew the offer he had made. Of course the withdrawal could not be effective if it were made after the contract had become complete. As soon as an offer has been accepted the contract is complete. But it is said that there could be a withdrawal by the defendant on the 19th of January on the ground that the offer of the defendant had been accepted by Scratchley, a director of the plaintiff company, who was not authorized to bind the company by acceptance of the offer, and therefore that until the company ratified Scratchley's act there was no acceptance on behalf of the company binding on the company, and therefore the defendant could withdraw his offer. Is that so? The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position

as if he had had authority to do the act at the time the act was done by him.

Various cases have been referred to as laying down this principle, but there is no case exactly like the present one. The case of *Hagedorn vs. Oliverson*, 2 M. & S. 485, is a strong case of the application of the principle. It was there pointed out how favorable the rule was to the principal, because till ratification he was not bound, and he had an option to adopt or not to adopt what had been done. In that case the plaintiff had effected an insurance on a ship in which another person was interested, and it was held that long after the ship had been lost the other person might adopt the act of the plaintiff, though done without authority, so as to enable the plaintiff to sue upon the policy. Again, in *Ancona vs. Marks*, 7 H. & N. 686, where a bill was indorsed to and sued on in the name of Ancona, who had given no authority for that purpose, yet it was held that Ancona could, after the action had been brought, ratify what had been done, and that the subsequent ratification was equivalent to a prior authority so as to entitle Ancona to sue upon the bill. It was said by Mr. Brice (of counsel for defendant) that in that case there was a previously existing liability of the defendant towards some person: but the liability of the defendant to Ancona was established by Ancona's authorising and ratifying the act of the agent, and a previously existing liability to others did not affect the principle laid down.

The rule as to ratification is of course subject to some exceptions. An estate once vested cannot be divested, nor can an act lawful at the time of its performance be rendered unlawful, by the application of the doctrine of ratification. The case of *Walter vs. James*, L. R. 6 Ex. 124, was relied on by the appellant, but in that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void.

The case of *Bird vs. Brown*, 4 Ex. 786, which was also relied on by the appellant is distinguishable from this case. There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery of the goods before the ratification of the alleged *stoppage in transitu*. So, also, in *Lyell vs. Kennedy*, 18 Q. B. Div. 796, the plaintiff, who

represented the lawful heir desired, after the defendant Kennedy had acquired a title to the estate by means of the statute of limitations, and after the title of the heir was gone, to ratify the act of Kennedy as to the receipt of rents, so as to make the estate vest in the heir. In my opinion none of these cases support the appellant's contention.

I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company. If that were not shown there would be no contract on the part of the company, but when and as soon as authority was given to Scratchley to bind the company the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant withdrawing his offer, because it was then no longer an offer, but a binding contract. * * *

The other justices delivered concurring opinions.

Appeal dismissed.

NOTE.—See two preceding cases and notes. *Ancona vs. Marks*, 7 H. & N. 686, cited in the principal case, is cited and followed, as to the retroactive effect of the ratification of the institution of a suit, in *Day Land & Cattle Co. vs. State of Texas*, (1887) 68 Tex. 526.

In *Sequin vs. Peterson*, (1873) 45 Vt. 255, 12 Am. Rep. 194, a previous demand of a wife was held sufficiently ratified by the subsequent institution of a suit by the husband, based upon such demand.

See also *Woodward vs. Harlow*, (1856) 28 Vt. 338, *ante* p. 165; *Rice vs. McLarren*, *ante* p. 190.

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3. *Between Agent and the other Party.*

(4 MAULE & SELWYN, 259.)

STEPHENS vs. ELWALL.

(English Court of King's Bench, Trinity Term, 1815.)

Trover for goods which had been wrongfully sold by bankrupts after their bankruptcy. The goods had been bought by one Deane for his principal Heathcote who was in America. Defendant was Heathcote's clerk, and, having received the goods, he sent them to Heathcote. The trial judge, LEBLANC, instructed the jury that if

the defendant was acting merely as clerk for Heathcote, he would not be liable; otherwise, if he was acting for himself. Verdict for the defendant. Motion for new trial.

Park, contra.

Topping and *Richardson,* for the motion.

LORD ELLENBOROUGH, C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion, who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution.

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was whether the goods were for Heathcote or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

Per Curiam. Rule absolute.

NOTE.—Where an agent who has without right purchased a husband's property from the wife, has taken possession, and turned it over to his principal, this of itself is a conversion: and demand by the husband before suing the agent for conversion is not necessary. *Rice vs. Yocum,* — Penn. St. —, 26 Atl. Rep. 698.

If one having the custody of goods for carriage, fraudulently appropriate them to his own use by consigning them in his own name for sale to a factor who makes advances upon them, the factor is liable for conversion to the rightful owner if he sell them and retain the advances out of the proceeds, although he is entirely ignorant of any want of title in his customer and wholly innocent of any wrong intent. *Per* JACKSON, J., HAMMOND, J. *contra: Moore vs. Hill,* (1889) 38 Fed. Rep. 330.

Any person, who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of another, is liable for a conversion.

Hollins vs. Fowler, (1875) L. R. 7, H. L. 757, 14 Moak's Eng. Rep. 138. See, also, *Saltus vs. Everett*, 20 Wend. (N. Y.) 263, 32 Am. Dec. 541. So it has been held that an auctioneer who has, in good faith, received and sold property for one whom he supposed to have the right to direct the sale, but who, in fact, had no such right, is guilty of a conversion. *Farebrother vs. Ansley*, 1 Camp. 343; *Adamson vs. Jarvis*, 4 Bing. 66.

A factor who receives for sale goods from one whom he believes to be the true owner, and having sold them, remits the proceeds to his consignor, is not liable for conversion to another who subsequently proves that he was the owner. *Roach vs. Turk*, (1872) 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360.

In a note to *Ryman vs. Gerlach*, 153 Penn. St. 197, 32 Am. L. Reg. 781, this rule is stated as the result of the authorities: "An agent is excused for what he does, if the act is of such a nature as would be excused if performed by a custodian having a lawful possession and *prima facie* title such as a finder or bailee, even though the possession of the servant or agent is wrongful, provided the latter is ignorant of the real ownership."

CHAPTER VI.

OF DELEGATION OF AUTHORITY.

(4 GRAY, 518, 64 AM. DEC. 92.)

APPLETON BANK vs. McGILVRAY.

(Supreme Judicial Court of Massachusetts, October, 1855.)

Defendants who did business in Boston held a note against a firm doing business in Lowell, due April 7, 1854. They delivered the note to an expressman between Boston and Lowell for collection, and directed him to collect in the ordinary way. The expressman sometimes collected notes left with him by calling upon the maker personally and sometimes by depositing them in a bank. He did not inform defendants how he intended to collect their note, nor did he know whether they were aware that he sometimes collected through a bank. He left the note with plaintiff, a bank in Lowell, for collection. On the 8th of April, he called at the bank and asked if the note had been paid, and was told that it had been, and he was given the amount which he turned over to defendants, less his charges. The note in fact had not been paid, nor had the maker been notified, and it was the mistake of a clerk in the bank in saying that it had been and in delivering the money to the expressman. Immediately upon discovering the mistake the bank demanded payment of the makers which was refused. The bank then tendered back the note to defendants and demanded the return of the money paid to the expressman, which was refused, and this action was to recover it. It appeared that the makers of the note could not and would not have paid the note if it had been presented at maturity. Verdict by consent for plaintiffs subject to opinion of the full court.

D. S. Richardson and *W. A. Richardson,* for the plaintiffs.

J. G. Abbott, for the defendants.

By Court, BIGELOW, J. The objection that this action cannot be maintained, for want of privity between the parties to the suit, is not sustained by proof. The rule of law is well settled, that in

the absence of any authority, either express or implied, to employ a subagent, the trust committed to an agent is exclusively personal, and cannot be delegated by him to another so as to affect the rights of the principal. In such case, if the agent employs a substitute, he does it at his own risk and upon his own responsibility. The agent only is liable to the principal, and the subagent is responsible solely to his immediate employer; nor can the principal be liable for the acts of the subagent. There is no privity between them upon which any mutual rights and remedies can be based.

But this general rule is always subject to be modified by the peculiar circumstances of each particular case, from which, or from the usage of trade, a power to delegate an authority can be inferred: Story on Agency, secs. 14, 388.

In the case at bar, it appears that the defendants delivered the note for collection to the carrier, with directions "to collect it in the ordinary way," and that it was his custom to collect notes by depositing them in a bank, as well as by calling on the parties personally. The directions given by the defendants were equivalent to an authority to adopt either of the modes of collecting the note which the carrier was in the habit of using, and well warranted the jury in finding that the plaintiffs were duly employed as the agents of the defendants in this particular transaction. We cannot doubt that if the carrier had died or become insolvent before payment to him of the amount collected by the plaintiffs, the defendants, upon disclosure of the agency, would have had a good claim therefor against the plaintiffs. The privity necessary to make the parties liable to each other is created by the authority to employ a subagent, which is fairly to be inferred from the evidence.

This view of the legal relation of the parties is decisive of the remaining objection to the plaintiff's right of recovery in this action. The money was clearly paid over to the defendants under a mistake of fact, and, upon familiar principles, an action can be maintained to recover it back. It is no answer to the plaintiffs' claim that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is, that money paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it consistently with a true application of the real facts to the legal rights of the parties: 2 Saund. Pl. & Ev. 2 ed. 394. The cause of the mistake, therefore, is wholly immaterial. The money is none the less due to the plaintiffs because their negligence caused

the mistake under which the payment was made. The case would have been different if it had appeared that the defendants had suffered any damage, or changed their situation as respects their debtor, by reason of the laches of the plaintiffs. But the facts show that their rights were wholly unaffected by the mistake under which the payment was made. Nothing occurred subsequently to the payment which renders it unconscientious to recover the money back. It is therefore clear that the defendants have money belonging to the plaintiffs in their hands, to which they show no legal or equitable title. *Kelly vs. Solari,* 9 Mee. & W. 54; *Bell vs. Gardiner,* 4 Man. & Gr. 11; *Horn vs. Baker,* 2 Smith's Lead. Cas. 243, 244.

Judgment on the verdict.

(73 NEW YORK, 73, 29 AM. REP. 105.)

BIRDSALL vs. CLARK.

(New York Court of Appeals, March, 1878.)

Action to restrain the superintendent of streets of Binghamton, and his servants, from repairing the sidewalk in front of plaintiff's premises. In 1873 the common council of that city, by resolution, determined to make certain repairs to the sidewalks in the street on which the plaintiff's premises fronted, and directed the plaintiff to make the sidewalk in front of his premises conform thereto by a specified day. The plaintiff failed to comply, and the defendant, as such superintendent, proceeded to make the repairs, pursuant to another resolution set forth in the opinion. The plaintiff had judgment which was reversed at general term, and he appealed. Other facts appear in the opinion.

Ausburn Birdsall, appellant, in person.

Samuel Hand, for respondents.

CHURCH, C. J. There is no question but that the common council had full power to ordain the grading and curbing of the sidewalk in front of the plaintiff's premises, and that for any incidental or consequential injury the plaintiff had no remedy, upon the general principle that private interests are subordinate to the public good. By section 14 of title 8 of the charter of the city of

Binghampton, the building and maintaining in good order of all sidewalks is to be done at the expense of the premises in front of which they are required, or of the owner thereof; and after providing that the common council shall order the work to be done within a specified time, and cause a notice of the same to be served upon the owner or person in possession of the premises, it provides that "If any work shall not be done within the time limited therefor, *the common council shall by contract, or otherwise, cause it to be done,* and assess the expenses thereof, with ten per cent additional upon said premises, or upon the owner thereof."

In 1870 the common council passed a general resolution directing the superintendent of streets, when the owner neglected to do the work by the time limited, "to cause the same to be done," and the question is whether this is a proper exercise of the power conferred upon the common council by the clause before quoted. It is a well settled principle that public powers or trusts devolved by law or charter upon the council or governing body to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. (Dill. on Mun. Corp. § 60.) If discretion and judgment are to be exercised, either as to time or manner, the body or officer intrusted with the duty must exercise it, and can not delegate it to any other officer or person. On the other hand, a municipal corporation may appoint agents, or give directions to subordinate officers to perform duties of a ministerial or administrative character. Dill. on Mun. Corp., § 60. The point involved is within a narrow compass. Any work not done within the time limited, the charter requires the common council to cause to be done by contract or otherwise. The council directed, not in a specific case, but in all cases, that the superintendent of streets should "cause the work to be done," thus delegating the precise authority conferred upon it. The charter conferred the power upon the council to cause it to be done, by contract *or otherwise.* This requires the exercise of discretion and judgment as to the manner in which the work should be done. Whose judgment is to be exercised? The legislature has said that it is the judgment of the council, but the latter has attempted to invest the superintendent of streets with its exercise. This they had no power to do. The charter clearly contemplates the action of the council in each case. As to one work, it may be judicious and economical to direct that it be done by contract, and let to the lowest bidder; in another, by contract with a particular person without bidding;

in another, partly by contract and partly by day's work; and in another, entirely by day's work; and other terms and directions might be appropriate.

The owner, who is ultimately to pay the expense, has an interest in the manner in which the work is to be done, because it may materially affect the amount of the expense. He is entitled to the judgment of the council on that question. The principle decided in the case of *Thompson vs. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385, is applicable. There the common council of Schenectady were authorized to make by-laws and ordinances directing the improvement of streets within such time and in such manner as they might prescribe, and passed an ordinance for pitching and flagging a certain street in such manner as the city superintendent, under the direction of a committee of the common council, should direct and require. This court held the ordinance void by omitting to specify the manner in which the improvement was to be made. The court say: "In effect it is a power of taxation, which is the exercise of sovereign authority, and nothing short of the most positive and explicit language can justify the court in holding that the legislature intended to confer such a power on a city officer or committee." The particular description of the work is no more important than the mode of making the expenditure, and the same principle applies to every power conferred upon the council until the improvement is finished and the tax collected. It is a general rule that such powers must be exercised in strict conformity to law, and that any interference by public bodies or officers with the property-rights of the citizen can only be justified by clear authority of the statute. It seems to me quite clear that the proposed expenditure required the action of the common council to determine the manner of doing the work, and this being so, it is equally clear that such action must have been taken in accordance with section 11 of title 4 of the charter. It was a "resolution" involving the expenditure of money for a local improvement, and affected rights of property.

I have examined the other provisions of the charter referred to, prescribing the powers and duties of the superintendent of streets, and the power of the common council to prescribe the duties of officers, and do not find anything to affect the views before expressed as to the proper construction of the clause quoted.

The order of the General Term must be reversed, and the judgment entered upon the report of the referee affirmed.

NOTE.—See, also, *Lyon vs. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Gale vs. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Hydes vs. Joyes*, 4 Bush, (Ky.) 464, 96 Am. Dec. 311; *State vs. Hauser*, 63 Ind. 155; *State vs. Bell*, 34 Ohio St. 194; *Matthews vs. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776.

In *Osgood vs. Nelson*, (1872) L. R. 5 H. L. 636, 645, where the question was as to the validity of a removal of the plaintiff from the office of chief clerk of the sheriff's court of the city of London, MARTIN, B., said: "The next objection taken was, that the amotion did not take place, as the law required, on the authority of the lord mayor, aldermen and commons, but by delegation. In our opinion there was no delegation at all What was done was, that a complaint having been made to the body which has control in the matter, viz: the mayor, aldermen and commons of the city of London, as to the conduct of Mr. Osgood, it was referred by them to a committee, which seems to have been long used in the corporation of London, known as the 'Officers' and Clerks' Committee,' and what they were directed to do was to make inquiry with reference to the alleged complaint, to take evidence, and to ascertain the truth of it, not for the purpose of that committee coming to any judgment or decision themselves, but for the purpose of their report being submitted to the mayor, aldermen and commons in order that they might come to a judgment upon it. The argument of the learned counsel is erroneous in point of fact. That has not taken place which they allege to have taken place, and therefore there was no delegation."

(26 MINNESOTA, 377.)

PETERSON vs. CHRISTENSEN.

(Supreme Court of Minnesota, March, 1880.)

Appeal by defendant from an order of the district court overruling a demurrer to the complaint.

B. F. Webber and *M. J. Severance,* for appellant.

S. L. Pierce and *J. Newhart,* for respondent.

BERRY, J. On February 21, 1878, defendant agreed with McCormick & Bro. to act as their agent for the sale of harvesting machines and mowers, for the season of 1878. On the next day, as party of the first part, he made an agreement with the plaintiff, as party of the second part, as follows, viz: that he would pay, turn over, and cause to be paid and turned over to the plaintiff, at such time and times as the plaintiff may designate, any and all money, payments, commissions and compensations, of whatever kind and nature, that are due or to become due, and that he may earn or that will in any manner accrue to him, by reason of his said

agency or as such agent; that the plaintiff should at all times have full and exclusive direction and control of each and every transaction entered into, and sale made by the defendant under his said agency; that the plaintiff should have free access to all the books kept by defendant; and control of all book-accounts, and notes taken for any of the said machinery, or repairs therefor, by the defendant; and that the defendant would not, at any time, do or cause to be done, any business by himself or others for him in or about said agency, or in regard to any sale or transaction thereunder, until he has first secured from the plaintiff his approval and direction. For an alleged breach by defendant of the foregoing agreement, the plaintiff brings this action for damages. The defendant interposes a general demurrer.

In support of the demurrer it is contended that the agreement is void as against public policy. The argument is that defendant's agency was presumably an ordinary one, the duties of which are personal and not assignable; that, therefore, defendant held a personal trust, and his principals were entitled to his personal judgment in the business of his agency; that by the agreement upon which this action is brought, defendant in effect transferred his agency, and surrendered his personal judgment, to the plaintiff, and that such transfer and surrender are against public policy.

It would be unwise to attempt to furnish an exact definition by which to determine whether a contract is or is not void as against public policy. As with regard to fraud, it is safer to determine questions of this kind as they arise in particular cases. See Story on Contracts, § 546. But there need be no hesitation in laying down the general rule, that a contract is not void as against public policy unless it is injurious to the interests of the public, (2 Chitty on Contracts, 982,) or, as it is sometimes expressed, "contravenes some established interest of society." Story on Contracts, § 546. See, also, Bishop on Contracts, § 460.

The case at bar does not fall within this rule. Admitting what is claimed by the defendant, but what does not necessarily appear from the complaint, viz., that the transfer of the defendants' agency was unauthorized, the case would be simply one in which the defendant had exceeded his authority, perhaps ignorantly and perhaps with a fraudulent intent, it matters not which. The transaction is private merely, affecting no one but the parties to it, and no public interest or established interest of society is in any way involved.

Order affirmed.

(50 ALABAMA, 347.)

HARRALSON vs. STEIN.

(Supreme Court of Alabama, January, 1874.)

Action by Harralson & Co., against Stein for the value of a box of tobacco sold and delivered to him by the plaintiffs. There was evidence tending to show that Stein went to the plaintiffs store to purchase a lot of tobacco. He told one of the plaintiffs of his purpose, and the plaintiff directed his clerk, Jordan, to "sell to Mr. Stein all the tobacco you can."

The clerk sold to Stein, at sixty cents per pound, ten boxes of tobacco, which, except one, were in the United States bonded warehouse, and one was in the store. The sale was completed, except the payment of the money and the delivery of the tobacco. The plaintiffs, who were factors, held the tobacco for sale as commission-merchants and factors, and had instructions not to sell for less than seventy cents a pound. When the plaintiff, who had directed the clerk to make the sale, was told the price, he refused to deliver the tobacco under the sale by the clerk, except one box, which was in the store where the sale occurred.

This box was delivered, and carried away by Stein, at the price agreed on between Stein and the clerk. The clerk was the general agent of the factors, authorized by them to sell any goods consigned to them, intrusted to his care. This sale by the clerk was made on the 16th day of February, 1872. A few days after this, Stein returned to the store, asked for his bill, and proposed to pay for the tobacco sold to him by the clerk, and demanded its delivery. The sale was then repudiated by Harralson & Co. and they refused to receive payment or to deliver it to Stein. The weight of the tobacco in all the boxes was shown to be about six hundred pounds. The quantity of the tobacco in the box which was delivered was also shown. Stein refused to pay for this; and Harralson & Co., in their own name, sued to recover its value; and Stein pleaded in recoupment of damages, that he had been injured by their failure and refusal to deliver to him the tobacco, which they had sold to him by their clerk, to a greater amount than the value of the tobacco which had been delivered, and for which the present suit was brought. There was a judgment for Stein in the court below, and Harralson & Co. appealed to this court.

There were two questions raised on the trial below, which were decided adversely to the appellants, to which they excepted, and which are insisted on as error in this court. The one was, that the appellants, being factors and commission-merchants, could not make a sale of the goods consigned to them, by the agency of their clerk. The other was as to the measure of damages when insisted on by way of recoupment.

D. P. Bestor, for appellants.

R. & O. J. Semmes, contra.

PETERS, C. J. (After stating the facts.) Upon the first proposition thus presented, it is contended that the appellants, being factors and commission merchants, were merely the agents of the owner of the tobacco, and could not sell it by their clerk. This is said upon the principle that an agency, being a delegated authority, it cannot be executed by a sub-agent, which is expressed in the maxim, *Delegata potestas non potest delegari.* But this maxim seems to refer to those agencies which involve the execution of a bare power; and although this may apply to factors and commission merchants in certain cases, yet it is not, as to them, an universal restriction. Story on Agency, §§ 13, 14; 2 Kent, 633, marg. But this principle is only invoked when the attempt is made to bind the owner by the acts of the sub-agent. It is otherwise when the factor assumes the position of principal, and the contract is attempted to be enforced in his name, as is the case in the present suit. When this is the case, the factor makes himself the principal in the transaction, and his clerk, who acts under his direction, becomes his agent, and in this way he consents to be bound by the law which governs the acts of parties who sustain such relations as principal and agent. It has been repeatedly settled by this court that an administrator may bind himself, by a sale of the decedent's personal property, which is void as to the estate; for the reason, doubtless, that he will not be permitted to undo what he has deliberately done to another's injury. *Snedicor vs. Mobly*, 47 Ala. 507; 12 Ala. 298; 5 Porter, 64. Here the sale was made by the factors' clerk, by their direction, and they are seeking to enforce it in part by this suit. If they choose to act in this way, they submit thus to be bound.

The same would be the case with the vendee. After the sale is completed, neither party to the contract can repudiate it. Such is the case here. * * * Affirmed.

(60 MISSOURI, 116.)

GRADY vs. AMERICAN CENTRAL INSURANCE COMPANY.

(Supreme Court of Missouri, May, 1875.)

Action upon a policy of insurance. Defense, *inter alia*, that by the terms of the policy it was not to be valid unless signed by defendant's agent, and that the agent had not signed, but his name was signed by another. There was evidence tending to show that the agent's name was signed by such other person with the agent's knowledge and consent. Judgment for defendant below.

Ranney and *Vories*, for plaintiff in error.

Doniphan & Reed, for defendant in error.

VORIES, J. * * * It is true, as insisted by the defendant in this case, that an agent cannot delegate his authority to act for his principal, without special authority from the principal to do so, or unless the act of the agent, who delegates the authority, is ratified by the principal with knowledge of the facts; but this rule does not apply to mere ministerial acts to be performed by the agent. It is not necessary that the agent should do such acts in person; if he direct the act to be done, or, with a full knowledge of the act, adopt it as his own, it is sufficient. *Commercial Bank vs. Norton*, 1 Hill, (N. Y.) 501; *Bartlett vs. Palmer*, 8 N. Y. 398; *Seymour vs. Wyckoff*, 10 N. Y. 213; *Lynn vs. Burgoyne*, 13 B. Mon. (Ky.) 400. * * *

Reversed.

NOTE.—See, also, that mechanical and ministerial duties may be delegated: *Williams vs. Woods*, 16 Md. 220; *Newell vs. Smith*, 49 Vt. 255; *Sayre vs. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Renwick vs. Foster*, 56 Iowa 527; *Bodine vs. Exchange Ins. Co.*, 51 N. Y. 123.

Usage and the custom of the trade may justify the delegation: *Darling vs. Stanwood*, 14 Allen, (Mass.) 504; *Johnson vs. Cunningham*, 1 Ala. 249; *Smith vs. Sublett*, 28 Tex. 163.

So delegation may be warranted by the evident expectation and intention of the parties at the time the authority was conferred: *Johnson vs. Cunningham, supra*; *Duluth National Bank vs. Insurance Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

(112 UNITED STATES, 276.)

EXCHANGE NATIONAL BANK vs. THIRD NATIONAL BANK.

(United States Supreme Court, November, 1884.)

Plaintiff, a bank in Pittsburgh which had discounted them, sent to defendant, a bank in New York, eleven unaccepted drafts drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J." Defendant sent them to a bank in Newark for collection. They were recognized by all the banks as drafts upon the Tea Tray Company. The Newark bank took Conger's individual acceptance, on his refusal to accept, as secretary, but gave no notice of this until the drawers and indorsers of the drafts had become insolvent. This action was to hold defendant liable for the neglect of the Newark bank. Judgment below for defendant and plaintiff brings error.

John R. Emery and *Thomas N. McCarter*, for plaintiff in error.

A. Q. Keasbey, for defendant in error.

BLATCHFORD, J. (After stating the facts.) It is contended by the defendant, that its liability, in taking at New York for collection these drafts on a drawee at Newark, extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent, with proper instructions; and that the Newark bank was not its agent, but the agent of the plaintiff, so that the defendant is not liable for the default of the Newark bank, due care having been used in selecting that bank. Such would be the result of the rule established in Massachusetts. *Fabens vs. Mercantile Bank*, 23 Pick. 330; 34 Am. Dec. 59; *Dorchester Bank vs. New England Bank*, 1 Cush. 177; in Maryland, *Jackson vs. Union Bank*, 6 Har. & Johns. 146; in Connecticut, *Lawrence vs. Stonington Bank*, 6 Conn. 521; *East Haddam Bank vs. Scovil*, 12 Conn. 303; in Missouri, *Daly vs. Butchers' & Drovers' Bank*, 56 Mo. 94; 17 Am. Rep. 663; in Illinois, *Ætna Ins. Co. vs. Alton City Bank*, 25 Ill. 243; in Tennessee, *Bank of Louisville vs. First Nat'l Bank*, 8 Baxter, 101, 35 Am. Rep. 691; in Iowa, *Guelich vs. Nat'l State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; and in Wisconsin, *Stacy*

vs. Dane County Bank, 12 Wis. 629; *Vilas vs. Bryants,* Id. 702.[1] The authorities which support this rule rest on the proposition, that since what is to be done by a bank employed to collect a draft payable at another place cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the sub-agent; and that the incidental benefit which the bank may receive from collecting the draft, in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the sub-agent.

The contrary doctrine, that a bank receiving a draft or bill of exchange in one State for collection in another State from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers or from that of its correspondent in the other State, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York: *Allen vs. Merchants' Bank,* 22 Wend. 215, 34 Am. Dec. 289; *Bank of Orleans vs. Smith,* 3 Hill, 560; *Montgomery County Bank vs. Albany City Bank,* 3 Selden, 459; *Commercial Bank vs. Union Bank,* 1 Kernan, (11 N. Y.) 203, 212; *Ayrault vs. Pacific Bank,* 47 N. Y. 570, 7 Am. Rep. 489; in New Jersey, *Titus vs. Mechanics' National Bank,* 6 Vroom (35 N. J. L.) 588; in Pennsylvania, *Wingate vs. Mechanics' Bank,* 10 Penn. St. 104;[2] in Ohio, *Reeves vs. State Bank,* 8 Ohio St. 465;[3] and in Indiana, *Tyson vs. State Bank,* 6 Blackford, 225.[4] It has been so held in the second circuit, in *Kent vs. Dawson Bank,* 13 Blatchford, 237; and the same view is supported by *Taber vs. Perrott,* 2 Gall. 565;

[1] This rule prevails also in Mississippi. *Tiernan vs. Commercial Bank,* 7 How. 648; *Agricultural Bank vs. Commercial Bank,* 7 Sm. & M. 592; *Bowling vs. Arthur,* 34 Miss. 41; *Third National Bank vs. Vicksburg Bank,* 61 Miss. 112, 48 Am. Rep. 78; Louisiana, *Hyde vs. Planters' Bank,* 17 La. Ann. 560; *Baldwin vs. Bank of Louisiana,* 1 La. Ann. 13; Pennsylvania, *Merchants' National Bank vs. Goodman,* 109 Penn. St. 422, 58 Am. Rep. 728.

[2] This seems to be an error. See *Merchants' National Bank vs. Goodman,* 109 Penn. St. 422, 58 Am. Rep. 728.

[3] See, also, *Bank vs. Butler,* 41 Ohio St. 519, 52 Am. Rep. 94.

[4] The same rule obtains in Michigan, *Simpson vs. Waldby,* 63 Mich. 439; Montana: *Power vs. First National Bank,* 6 Mont. 251, and Minnesota; *Streissguth vs. National Bank,* 43 Minn. 50.

and by the English cases of *Van Wart vs. Woolley*, 3 B. & C. 439; s. c. 5 D. & R. 374, and *Mackersy vs. Ramsays*, 9 Cl. & Fin. 818. In the latter case, bankers in Edinburgh were employed to obtain payment of a bill drawn on Calcutta. They transmitted it to their correspondent in London, who forwarded it to a house in Calcutta, to whom it was paid, but, that house having failed, the bankers in Edinburgh being sued, were, by the House of Lords, held liable for the money on the ground that, they being agents to obtain payment of the bill, and payment having been made, their principal could not be called on to suffer any loss occasioned by the conduct of their sub-agents, between whom and himself no privity existed.

The question under consideration was not presented in *Bank of Washington vs. Triplett*, 1 Pet. 25; for although the defendant bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated.

In *Hoover vs. Wise*, 91 U. S. 308, a claim against a debtor in Nebraska was placed by the creditor in the hands of a collecting agency in New York, with instructions to collect the debt, and with no other instructions. The agency transmitted the claim to an attorney at law in Nebraska. The attorney received the amount of the debt from the debtor in Nebraska, in fraud of the bankrupt law, and paid it over to the agency, but the money did not reach the hands of the creditor. The assignee in bankruptcy having sued the creditor to recover the money, this court (three justices dissenting) held that the attorney in Nebraska was not the agent of the creditor in such a sense that his knowledge that a fraud on the bankrupt law was being committed was chargeable to the creditor on the ground that, the collecting agency having undertaken the collection of the debt, and employed an attorney to do so, the attorney employed by it, and not by the creditor, was its agent, and not the agent of the creditor; and the creditor was held not to be liable to the assignee in bankruptcy for the money. In the opinion of the court it is said, that the case falls within the decisions in the above-mentioned cases of *Reeves vs. State Bank*, 8 Ohio St. 465; *Mackersy vs. Ramsays*, 9 Cl. & Fin. 818; *Montgomery County Bank vs. Albany City Bank*, 3 Selden, 459; *Commercial Bank vs. Union Bank*, 1 Kernan, 203; and *Allen vs. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, and it is said that those cases, the first three of which are stated at length, show " that

where a bank, as a collection agency, receives a note for the purpose of collection, its position is that of an independent contractor, and the instruments employed by such bank in the business contemplated are its agents and not the sub-agents of the owner of the note." The court proceeds to say, that those authorities go far towards establishing the position, that the collecting agency was an independent contractor, and that the attorney it employed was its agent only, and not in such wise the agent of the defendant as to make the defendant responsible for the knowledge of the attorney in Nebraska. The court then cites, as a case in point, *Bradstreet vs. Everson*, 72 Penn. St. 122, 13 Am. Rep. 665, as holding that where a commercial agency at Pittsburg received drafts to be collected at Memphis, and sent them to its agent at Memphis, who collected the money and failed to remit it, the agency at Pittsburg was to be regarded as undertaking to collect, and not merely receiving the drafts for transmission to another for collection, and as being liable for the negligence of its agent at Memphis. It also cites, as to the same purport, *Lewis vs. Peck*, 10 Ala. 142, and *Cobb vs. Becke*, 6 Ad. & El. 930. It then says that these authorities fix the rule, before stated, on which the decision is rested. So far from there being anything in that case which goes to exonerate the defendant in the case at bar, its reasoning tends strongly to affirm the principle on which the defendant must be held liable. Indeed, its language supports the view that the Newark bank, in this case, would not be liable directly to the plaintiff. If that be so, and the defendant is not liable, the plaintiff is without remedy. * * * (Distinguishing *Britton vs. Niccolls*, 104 U. S. 757.)

The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the New York bank, first receiving these drafts for collections, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation resulting from the deposit of the drafts with the New York bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the

plaintiff, as a customer, in the usual course of business. There are eleven drafts in the case, running through a period of over three months, and the defendant had previously received from the plaintiff two other drafts, acceptances of which it had procured from Congor, at Newark, through the Newark bank. The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. *Smedes vs. Bank of Utica*, 20 Johns. 372, and 3 Cowen, 662; *McKinster vs. Bank of Utica*, 9 Wend. 46; affirmed in *Bank of Utica vs. McKinster*, 11 Wend. 473. The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to perform a part of what it has contracted to do, becomes responsible to its customer. This general principle applies to all who contract to perform a service. It is illustrated by the decision of the Court of King's Bench in *Ellis vs. Turner*, 8 T. R. 531, where the owners of a vessel carried goods to be delivered at a certain place, but the vessel passed it by without delivering the goods, and the vessel was sunk and the goods were lost. In a suit against the owners for the value of the goods, based on the contract, it was contended for the defendants that they were not liable for the misconduct of the master of the vessel in carrying the goods beyond the place. But the plaintiff had judgment, Lord KENYON saying that the defendants were answerable on their contract, although the misconduct was that of their servant, and adding: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them."

The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. If the agency is an undertaking to do the business, the original principal may look to the immediate contract or with himself, and is not obliged to look to inferior or distant under-contractors or sub-agents, when defaults occur injurious to his interest.

Whether a draft is payable in the place where the bank receiving it for collection is situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of the owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent. If this is not done, or there is no implied understanding to that effect, the same responsibility is assumed in the undertaking to collect foreign paper and in that to collect paper payable at home. On any other rule, no principal contractor would be liable for the default of his own agent, where, from the nature of the business, it was evident he must employ sub-agents. The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent, and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used.

We regard, as the proper rule of law applicable to this case, that declared in *Van Wart vs. Wooley*, 3 B. & C. 439, where the defendants, at Birmingham, received from the plaintiff a bill on

London to procure its acceptance. They forwarded it to their London banker, and acceptance was refused, but he did not protest it for non-acceptance or give notice of the refusal to accept. Chief Justice ABBOTT said: "Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondent) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damages he may have sustained by their neglect." In that case there was a special pecuniary reward for the service. But, upon the principles we have stated, we are of opinion that, by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage or of any express agreement to that effect, liable for a neglect of any duty occurring in that collection, from the default of its correspondent in Newark.

What was the duty of the defendant, and what neglect of duty was there? An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and, if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence. *Allen vs. Suydam*, 20 Wend. 321, 32 Am. Dec. 555; *Walker vs. Bank of the State of New York*, 5 Selden, 582. The drawer or indorser of such a draft is, indeed, not discharged by the neglect of the holder to present it for acceptance before it becomes due. *Bank of Washington vs. Triplett*, 1 Pet. 25, 35; *Townsley vs. Sumrall*, 2 Pet. 170, 178. But, if the draft is presented for acceptance and dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser, or he will be discharged. 3 Kent's Comm. 82; *Bank of Washington vs. Triplett*, 1 Pet. 25, 35; *Allen vs. Suydam*, 20 Wend. 321, 22 Am. Dec. 555; *Walker vs. Bank of the State of New York*, 5 Selden, 582; *Goodall vs. Dolley*, 1 T. R. 712; Bayley on Bills, 2d Am. ed. 213. Moreover, the owner of a draft payable on a day certain, though not bound to present it for acceptance in order to hold the drawee and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and, on the dishonor of the draft by non-acceptance, and due protest and notice, the owner has a right of action at once against the drawer and indorser, without

waiting for the maturity of the draft; and his agent to collect the draft is bound to do what a prudent principal would do. 3 Kent's Com. 94; *Robinson vs. Ames*, 20 Johns. 146, 11 Am. Dec. 259; *Lenox vs. Cook*, 8 Mass. 460; *Ballingalls vs. Gloster*, 3 East, 481; *Whitehead vs. Walker*, 9 M. & W. 506; *Walker vs. Bank of the State of New York*, 5 Selden, 582.

In view of these considerations, it is well settled that there is a distinction between the owner of a draft and his agent, in that, though the owner is not bound to present a draft payable at a certain day for acceptance before that day, the agent employed to collect the draft must act with due diligence to have the draft accepted as well as paid, and has not the discretion and latitude of time given to the owner, and, for any unreasonable delay, is responsible for all damages sustained by the owner. 3 Kent's Comm. 82; Chitty on Bills, 13th Am. ed. 272, 273.

The defendant being thus under an obligation to present the drafts for acceptance, and having in fact, presented them through the Newark bank, to Conger, the secretary of the company, was bound not to take the acceptances it did, but to treat the drafts as dishonored. The plaintiff was, at least, entitled to an acceptance in the terms of the address on the drafts. *Walker vs. Bank of the State of New York*, 5 Selden, 582. The defendant had notice from the description of the drafts by the words "Newark Tea Tray Co.," in the letters sending them for collection, that the plaintiff regarded the drafts as drawn on the company; and the defendant recognized its knowledge of the fact that the drafts were drawn on the company, by describing them by the words "Newark Tea Tray Co.," in its letters to the Newark bank, in every instance but two. If, on the face of the drafts, the address was ambiguous, it was not for the defendant to determine the question, as against the plaintiff, by taking an acceptance which purported to be the acceptance of Conger individually, especially in view of the information it had by the words "Newark Tea Tray Co.," in the letters sending the drafts to it for collection. It appears that the drafts were discounted by the plaintiff as drafts on the company, and, if it could have had an acceptance in the terms of the address, it would, in a suit against the company, have been in a condition to show who was the real acceptor. But, with the information given to the Newark bank by Conger, while that bank had in its hands for acceptance drafts drawn in the same form as those here in question, that he would not accept such drafts in his official capacity as secretary,

the Newark bank chose to take acceptances individual in form. This was negligence, for which the defendant is liable to the plaintiff in damages, no notice of dishonor having been given. The defendant was bound to give such notice to the plaintiff. *Walker vs. Bank of the State of New York*, 5 Selden, 582. * * *

The judgment of the circuit court is reversed with direction to award a new trial.

(24 KANSAS, 600, 36 AM. REP. 264.)

CUMMINS VS. HEALD.

(Supreme Court of Kansas, July, 1880.)

Cummins, who was a lawyer and banker, received from Heald two notes, made by a party living in another part of the state, for collection. He gave to Heald a receipt stating that he had received the notes "for collection." He sent them to an attorney, Kroenke, who lived near the debtor, to be collected. Kroenke collected the money, kept it and absconded. This action was brought to hold Cummins liable. Verdict below for the plaintiff.

J. P. Cummins and *McClure & Humphreys*, for plaintiff in error.

Thompson & Thompson and *Johnston & Freeman*, for defendant in error.

HORTON, C. J. The principal question presented for our determination is, who shall bear the loss occasioned by the embezzlement of F. W. Kroenke,—Heald, the owner of the notes, or Cummins, who received the notes for collection? Counsel for plaintiff in error contend that as Cummins failed to receive any of the proceeds of the notes from Kroenke, he is not responsible for the loss, as he acted in good faith, and exercised ordinary care and diligence in all the transactions. Again, it is claimed by them, that Cummins received the notes for collection as a banker; that he was requested by Heald to send the notes to an attorney at law for collection; that in accordance with the request, he forwarded them to Kroenke; that Heald approved of this selection and action, and thereby that Kroenke was not the agent of Cummins, but of Heald only. In view of the evidence adduced upon the trial, and the special findings that Cummins received the notes as attorney at

law "for collection," and that the notes were to be collected by him, the latter claim has no support in the record.

Therefore, we can inquire only as to the liability of Cummins under the terms of the receipts for the collections. The decision in *Bradstreet vs. Everson*, 72 Penn. St. 124, 13 Am. Rep. 655, is a leading case upon the legal interpretation of a similar receipt of a claim for collection. It is there stated that such a receipt "for collection" imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible; that the attorney executing the receipt is therefore liable by its very terms for the negligence of the distant attorney, who is his agent; that he can not shift the responsibility from himself upon his client, that there is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt, when he knows he must employ another to make collection. See also, Weeks on Attorneys, sec. 117; Wharton on Neg. sec. 753; *Reeves vs. State Bank*, 8 Ohio St. 465; *Commercial Bank vs. Union Bank*, 11 N. Y. 203; *Walker vs. Stevens*, 79 Ill. 193; *Morgan vs. Tener*, 83 Penn. St. 305; *Kent vs. The Dawson Bank*, 13 Blatch. 237.

The authorities are decisive against the relief of Cummins on the ground of his good faith, or the exercise of ordinary care and diligence. He took the notes "for collection"; he corresponded with Kroenke, he selected him as his agent; he sent the notes to him at his own instance, and as he must be held liable under the receipts for collections made by his own agent, he must suffer the loss occasioned by the fraud of such agent.

Counsel questions the correctness of the instruction of the court that Heald was entitled to interest from the date the money was collected: $173.75 was collected by Kroenke on January 15, 1878; and $256.75 was collected August 26, 1878. Heald was informed by Cummins early in November, 1878, that Kroenke had collected the notes and absconded. Plaintiff in error alleges no demand was made until November 25, 1878, and that the jury cast interest on the money from the dates of the collections. It is the general rule that an attorney who collects money must give his client notice thereof immediately, and await instructions, and that no action will lie for the money collected by him until a demand is made, *Voss vs. Bachop*, 5 Kan. 59; yet, when the collection is followed by an embezzlement of the money collected, no demand is necessary to maintain an action for the recovery of the money. As Cummins

was civilly liable for the fraud of his agent, and as the money was embezzled upon its collection, the instruction of the court was not erroneous. Comp. Laws, 1879, chap. 51, page 509.

The judgment of the District Court will be affirmed.

All concur.

NOTE—See also *Cox vs. Livingston*, 2 Watts & S. (Pa.) 103, 37 Am. Dec. 486; *Rhines vs. Evans*, 66 Penn. St. 192, 5 Am. Rep. 364; *Sanger vs. Dun*, 47 Wis. 615, 32 Am. Rep. 789.

(141 MASSACHUSETTS, 37, 55 AM. REP. 443.)

BARNARD vs. COFFIN.

(Supreme Judicial Court of Massachusetts, January, 1886.)

Plaintiff had 160 acres of land in Illinois which he desired to sell and he employed the defendants to aid him in finding a purchaser. Defendants employed one Ochs to endeavor to get a customer for the land for them for a commission. Ochs received an offer of $22.50 per acre for the land, but reported it to defendants as an offer of $10 per acre. Defendants informed plaintiff of this offer of $10 and advised him that they thought it a fair one, and plaintiff, believing them, authorized them to accept it. Defendants advised Ochs that the offer was accepted, and a deed from plaintiff was procured to a person whom Ochs put forward as the purchaser but who was not really so. This person then conveyed to the real purchaser, who meantime had increased his offer to $22.75 per acre, at which rate he paid Ochs. Ochs returned $1,600 to defendants who transmitted it to plaintiffs less their commissions. The defendants acted in good faith having no knowledge that Ochs had received more than the $10 per acre. When plaintiff discovered the fraud, he sued defendants for the balance at the price received by Ochs and recovered. The defendents alleged exceptions. The other facts appear in the opinion.

B. R. Curtis & S. G. Croswell, for defendants.

G. O. Shattuck & W. A. Munroe, for plaintiff.

FIELD, J. Of the rulings requested by the defendants the second and third were refused because the facts were not found to

be as they were assumed to be in the requests, and this is a sufficient reason for the refusal.

The remaining exception is to the refusal to rule that on the whole evidence the plaintiff could not maintain the action. The judge found that no consent was given by the plaintiff to the defendants to delegate their authority to a sub-agent, and that no custom or usage to delegate authority in similar cases was shown; and that the nature of the employment of the defendants by the plaintiff was that they undertook, for a compensation to be paid them, to aid the plaintiff in selling the land, by obtaining, if possible, offers for it, and communicating them to him, for his acceptance or rejection, together with such information as they could readily obtain to assist him in determining his action upon these offers, and by consummating a sale in case such an offer was accepted. The judge also found that Ochs was the agent of the defendants in the business of obtaining and transmitting offers. The evidence warranted these findings. The only question of law is whether, with these findings, the plaintiff can, on the other facts found and on the evidence, maintain his action.

If Ochs was employed by the defendants, without the express or implied consent of the plaintiff, and if there was no usage in the business to employ sub-agents and there was no necessity from the nature of the business that sub-agents should be employed, there is no privity between the plaintiff and Ochs, and Ochs is only liable to his employers who were the defendants, and the defendants are liable to the plaintiff for the acts of Ochs, in the same manner as if those acts were their own. *Warren Bank vs. Suffolk Bank.* 10 Cush. 582; *Pownall vs. Blair,* 78 Penn. St. 403; *Darling vs. Stanwood,* 14 Allen, 504; *Stevens vs. Babcock,* 3 B. & Ad. 354.

It is argued that as the plaintiff knew before he signed the deed that the sale was made by Ochs, the plaintiff by confirming the sale and signing the deed, ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents, for whom they

should be responsible; and it was competent for the judge, on the evidence, to find that this was the understanding and intention of the plaintiff, and he has in effect so found.

The principle which runs through the cases is, that if an agent employs a sub-agent for his principal, and by his authority, express or implied, then the sub-agent is the agent of the principal, and is directly responsible to the principal for his conduct, and so far as damage results from the conduct of the sub-agent, the agent is only responsible for a want of due care in selecting the sub-agent; but the agent, having undertaken to do the business of his principal, employs a servant or agent on his own account to assist him in what he has undertaken; such a sub-agent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent.

The decision in this case, as reported in 138 Mass. 37, is that the finding that "the defendants were bound to see to it that the offer transmitted was a genuine offer and not the offer of a sub-agent," was a ruling of law which could not be supported if the defendants were only liable on the ground of negligence, and not on the ground that Ochs was their agent, for whose acts they were responsible.

Exceptions overruled.

NOTE.—See also, *Hoag vs. Graves*, 81 Mich. 628; *McCants vs. Wells*, 4 S. Car. 381.

CHAPTER VII.

OF THE TERMINATION OF THE RELATION.

I.

BY ORIGINAL AGREEMENT.

(See cases stated in text of Mechem on Agency, §§ 200, 201.)

II.

BY ACT OF THE PARTIES.

(73 ALABAMA, 373.)

CHAMBERS vs. SEAY.

(Supreme Court of Alabama, December, 1882.)

Action to recover damages for an alleged wrongful revocation of plaintiff's authority to sell lands. The opinion states the facts. Judgment for defendant, and plaintiff appealed.

Parsons & Parsons, S. F. Rice and *Bradford & Bishop,* for appellant.

Bowden & Knox, contra.

SOMERVILLE, J. The main contention in this case involves the right of the principal to revoke the agent's authority to sell, so as to deprive the latter of his commissions.

The agreement, which is the basis of this suit, is in writing, bearing date February 28, 1878, and is signed by both the plaintiff and defendant. Its substance is briefly as follows: Seay was the owner of a tract of land in Talladega county, valuable for the quantity of iron ore it was known to contain. He placed this land in the hands of Chambers for sale, subject to Seay's ratification, if he (Seay) should "deem the price to be paid for said property sufficient to warrant a sale." Chambers, on his part, agreed to

undertake the sale of the land, and to this end undertook and promised to transport specimens of ore taken from it to Birmingham, England, for inspection there; and also to advertise the property in one respectable paper in each of the cities of Birmingham and London, England. By way of compensation for his services and expenses, it was stipulated that Chambers should receive "an undivided one-fourth interest in the proceeds of sale when sold as aforesaid," and his right to sell was made "exclusive."

The evidence tends to show that Seay revoked the agency of Chambers in January, 1880, and very soon afterwards himself sold the property to one Glidden for the sum of twenty thousand dollars. The circuit court charged the jury, that the agreement in question was a mere revocable agency, which could be recalled by the principal, Seay, at any time before it had been executed, by his making a sale of the property; and if it was so revoked prior to the sale made by Seay to Glidden, then Chambers was not entitled to recover any commissions.

The rule is not denied, that, in ordinary cases, a principal, who has empowered an agent to sell, may at any time before sale revoke the agent's authority. It is equally true that the usual theory of commissions is, that the agent is to receive them only in the event of success. Wood's Mayne on Damages, (Amer. ed.) §§ 746-747.

It is argued that the present agreement does not come within this general rule, because it confers on the agent a power coupled with an interest, and that such a power is irrevocable. It is a generally admitted proposition of law, that a principal is not permitted to revoke the authority of his agent, where such authority is coupled with an interest, or where it is necessary to effectuate a security. Ewell's Evans on Agency, marg. page 83. These are the two established exceptions, which seem, indeed, to be essentially similar in principle. It is contended that the agency of the plaintiff Chambers comes within the influence of the first exception, as being coupled with an interest, and it was not competent, therefore, for Seay to revoke it. It is not any interest, however, that will suffice to render an agency irrevocable. An interest in the proceeds of sale, or money derived from the sale of property by an agent, is not sufficient for this purpose. *Barr vs. Schræder*, 32 Cal. 609; *Hartley's Appeal*, 53 Penn. St. 212, 91 Am. Dec. 207; *Gilbert vs. Holmes*, 64 Ill. 549. To be irrevocable, it seems now well settled, that the power conferred must create an *interest in the thing itself*, or in the property which is the subject

of the power. In other words, "the power and estate must be united and co-existent;" and, possibly, of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent. *Blackstone vs. Buttermore*, 53 Penn. St. 266, (*post* ——); *Bonney vs. Smith*, 17 Ill. 531; *Mansfield vs. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76; *Hunt vs. Rousmanier*, 8 Wheat. 174, (*post* ——); Evans on Agency (Ewell), marg. page 83, note, and p. 85; *Raleigh vs. Atkinson*, 6 M. & W. 670. In *Hunt vs. Rousmanier, supra*, such a power was defined by Chief Justice MARSHALL, to be one "engrafted on an estate in the thing itself."

The power conferred on Chambers was not of this nature, very clearly. He had no interest in the subject matter of his agency, the land itself. He was interested only in the money to be derived as the proceeds of the sale of the land, which could only be realized by the completion of his agency, or by some negotiation which was tantamount to it. He had parted with no money or other value for the security of which the power of sale was conferred in the agreement. He had risked in the venture of his agency only his personal services and the expenses incidental to its execution. The undertaking to transport specimens of iron ore to England, and to advertise the lands there, may be embraced as a part of the ordinary expense to be incurred in the usual course of such an employment. It is fair to presume that he risked this much in view of the large compensation to be reaped as commissions, in the event of a successful sale. *Simpson vs. Lamb*, 17 C. B. 603.

It is insisted further that the agency is rendered irrevocable by reason of the fact, that the power of sale conferred on Chambers was stipulated to be *exclusive*. This cannot be stronger than the use of the word "irrevocable," which has been construed to fail of such a purpose, unless the agency comes within the exceptions above discussed. In the case of a naked power, an express declaration of irrevocability will not prevent revocation. *McGregor vs. Gardner*, 14 Iowa, 326; *Blackstone vs. Buttermore*, 53 Penn. St. 266 (*post*, —).

The chief difficulty arises in those cases where the agent has incurred trouble and expense in the execution of his agency, and has been prevented from effecting a sale by the interference of his principal, whether by revocation of his authority or otherwise. It is not just, it is true, for a principal to revoke an agent's authority without paying him for labor and expense reasonably incurred in the course of the agent's employment.

Unless otherwise stipulated, the agent may, in a proper form of action, ordinarily claim reimbursement for the value of these. Evans' Agency (Ewell), marg. p. 83–84. So where a sale of property is brought about by the advertisements or exertions of a broker or agent, the broker being the efficient cause of the sale and the purchaser being found through his instrumentality, he may often recover his commissions. *Sussdorff vs. Schmidt*, 55 N. Y. 319; *Earp vs. Cummings*, 54 Penn. St. 394; 93 Am. Dec. 718. These are mentioned as just qualifications of the general rule, to which we have above adverted, touching the subject of the revocation of an agent's authority by his principal.

The pleadings in the present case, upon which it was tried, are framed very clearly with reference to a recovery of the stipulated commissions promised to Chambers, and the gravamen of the action is, in effect, alleged to be the wrongful revocation of the agency by act of the principal. We need not, for this reason, discuss the question as to the plaintiff's right to recover for the value of his services, or for expenses incurred. The first and fifth counts were obviously actions on the case, and the other counts were in assumpsit. *Myers vs. Gilbert*, 18 Ala. 467. The demurrer for misjoinder was consequently well taken, and was properly sustained by the court.

The rulings of the circuit court were in accordance with above views, and its judgments must be affirmed.

NOTE.—See, also, *Clark vs. Marsiglia*, 1 Denio, (N. Y.) 317, 43 Am. Dec. 670; *Owen vs. Frink*, 24 Cal. 178; *Lord vs. Thomas*, 64 N. Y. 110; *Attrill vs. Patterson*, 58 Md. 226; *Frink vs. Roe*, 70 Cal. 296; *Tucker vs. Lawrence*, 56 Vt. 467; *Simpson vs. Carson*, 11 Oreg. 361; *Darrow vs. St. George*, 8 Colo. 592. *Sibbald vs. Bethlehem Iron Co.*, *post.* p. —.

(53 PENNSYLVANIA STATE, 266.)

BLACKSTONE vs. BUTTERMORE.

(Supreme Court of Pennsylvania, January, 1867.)

Ejectment by Blackstone vs. Buttermore. Buttermore, who was the owner of the land in question, gave to one Davidson a power of attorney to sell the land on terms therein mentioned, which power concluded as follows: "and I hereby ratify and confirm what-

ever contract he may make in accordance with the above authority, and bind myself for its execution. This authority is irrevocable before the 1st day of May next." On the 19th of April, Davidson entered into an agreement for the sale of the land to Blackstone, which Buttermore refused to carry out, having previously revoked the power, of which Blackstone had notice at the time of the agreement. Verdict for defendant.

A. Patterson, for plaintiff in error.

D. Kaine and *C. E. Boyle,* for defendant in error.

AGNEW, J. A power of attorney constituting a mere agency is always revocable. It is only when coupled with an interest in the thing itself, or in the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a security for money advanced or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power, like a will, is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation. An interest in the proceeds to arise as mere compensation for the service of executing the power will not make the power irrevocable. Therefore, it has been held that a mere employment to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed, and to be measured by its extent. *Coffin vs. Landis,* 46 Penn. St. 426.

In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed. In this case the object of the principal was to make sale solely for his own benefit. The agreement to give his agent a certain sum and a portion of the proceeds was merely to carry out his purpose to sell. But what obligation was there upon him to sell, or what other interest beside his own was to be secured by the sale? Surely his determination to sell for his own ends alone was revocable. If the reasons for making a sale had ceased to exist, or he should find a sale injurious to his interests, who had a right to say he should not change his mind? The interest of the agent was only in his compensation for selling, and without a sale this is not earned. A revo-

cation could not injure him. If he had expended money, time or labor, or all, upon the business intrusted to him, the power itself was a request to do so, and on a revocation would leave the principal liable to him on his implied assumpsit. But it would be the height of injustice if the power should be held to be irrevocable merely to secure the agent for his outlay or his services rendered before a sale. The following authorities are referred to: *Hunt vs. Rousmanier*, 8 Wheaton (U. S.) 174 *post* ——. Story on Agency, §§ 463, 464, 465, 468, 476, 477; Paley on Agency, 155; 1 Parsons on Contracts, 59; *Irwin vs. Workman*, 3 Watts, (Pa.) 357; *Smith vs. Craig*, 3 W. & S. 20.

The judgment is therefore affirmed.

(111 INDIANA, 206.)

ROWE vs. RAND.

(Supreme Court of Indiana, May, 1887.)

The First National Bank of Indianapolis (No. 55) and the Indiana Banking Company were jointly interested in certain personal property and put Rowe in charge of it to sell it out on their account. The proceeds were, with the consent of both parties, deposited by Rowe in the bank of the Indiana Banking Company in the name of "William Rowe, trustee." Afterwards the First National Bank of Indianapolis (No. 2556) was organized to succeed to the business of No. 55. While this deposit amounted to over $7,000, the banking company became insolvent, and on August 10, 1883, the day before it closed its doors, it had a settlement with the First National Banks, and duplicate releases were executed by which each released the other of all claims whatever. Rand was appointed receiver of the banking company, and Rowe sought to recover from him the amount deposited in his name as trustee. Judgment against him and he appealed.

H. J. Milligan, for appellant.

F. Winter and *J. M. Winters*, for appellee.

NIBLACK, J. (After stating the facts.) A trustee is one to whom an estate has been conveyed in trust, and, consequently, the

holding of property in trust constitutes a person a trustee. An agent is one who acts for, or in the place of another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered. In the case of an ordinary agency for the sale or disposition of property, the title to the property, as well as to the proceeds, remains in the principal. Such an agency may be revoked at any time in the discretion of the principal. It may, also, be in like manner terminated by the renunciation of the agent, he being liable only for the damages which may result to the principal. An agency may also be, and is revoked by operation of law in certain cases, among which are the bankruptcy of the principal, the extinction of the subject matter of the agency, the loss of the principal's power over such subject matter, or the complete execution of the business for which the agency was created; also, where the changed condition becomes such as to produce an incapacity in either party to proceed with the business of the agency. Where a power or authority to act as agents is conferred on two persons, the death of one of them terminates the agency. So, where two persons are jointly appointed agents to take charge of a particular business for a specified term or purpose, and one of them becomes incapacitated before the term is completed or the purpose is accomplished, the other cannot proceed alone without the consent of the principal, and hence the agency is thereby in effect revoked. Abbott's and Bouvier's Law Dictionaries, titles "Agent" and "Agency;" 1 Wait's Actions and Defenses, 289; 1 Parsons Contracts, 39 *et seq.*; Story on Agency, §§ 38, 42, 474, 499.

The inevitable inference from these legal propositions is, that when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of their joint interest afterwards occurs, the severance revokes the agency.

An agent may sue in his own name: *First,* When the contract is in writing, and is expressly made with him, although he may have been known to act as agent. *Secondly,* When the agent is the only known or ostensible principal, and is, therefore, in contemplation of law, the real contracting party. *Thirdly,* When, by the usage of trade, he is authorized to act as owner, or as a principal contracting party, notwithstanding his well-known position as agent only. But this right of an agent to bring an action, in certain

cases, in his own name, is subordinate to the rights of the principal, who may, unless in particular cases where the agent has a lien or some other vested right, bring suit himself and thus suspend or extinguish the right of the agent.

Applying the general principles thus announced to the facts hereinbefore stated, our conclusions are, that Rowe became an agent only, and hence not a trustee, for the sale of the property left with him by the banks; that he acquired no lien either upon the property or its proceeds which would have prevented the national banks, or either of them, as the situation might have authorized at the time, from revoking Rowe's authority as their agent, and demanding an accounting from the banking company as to the money deposited with it by him, or from demanding such an accounting without revoking Rowe's agency; that, consequently, the money so deposited constituted a fund upon which the national banks might have based a claim against the banking company when the agreement was mutually entered into on the 10th day of August, 1883, and that, if, in fact, all claim against that fund was released by the agreement of that date, the agency of Rowe in all matters concerning the fund was thereby revoked, leaving him in a position to demand only an accounting for his services and expenses.

(The court then find that the effect of the release was to relinquish the national banks' claim upon this fund.)

Judgment affirmed.

(LAW REPORTS, 1 APPEAL CASES, 256, 15 MOAK'S ENG. REP. 124.)

RHODES vs. FORWOOD.

(English House of Lords, May, 1876.)

Action for damages for an alleged breach of contract.

Rhodes was the owner of the Risca Colliery; Forwood & Paton were brokers in Liverpool. The declaration set forth an agreement dated the 24th of September, 1869, of which the material parts were stated in the opinion.

The agreement was acted upon by the parties until the 1st of March, 1873, when the defendants contracted to sell the Risca colliery, and the vendees took possession of it on the 22d of that

month, and from that the plaintiffs had ceased to be employed in the sale of the coals.

Forwood & Paton having brought their action on the agreement, it was referred to a barrister, who stated a case for the opinion of the court. Upon argument in the Court of Exchequer, judgment was given by Mr. Baron BRAMWELL and Mr. Baron CLEASBY, for the defendant Rhodes. Upon error to the Exchequer Chamber, that judgment was reversed by Lord COLERIDGE, Mr. Justice LUSH, and Mr. Justice ARCHIBALD. Diss. Mr. Justice QWAIN. The case was then brought up on error to this house.

Mr. Benjamin, Q. C., and *Mr. Patchett*, for the plaintiff in error.

Mr. Manisty, Q. C., and *Mr. J. C. Bigham*, for the defendants in error.

The LORD CHANCELLOR (Lord CAIRNS): My Lords, I do not think that any of your Lordships can have any doubt as to the decision which the house ought to give in the present case. The case itself lies in an extremely short compass. As regards its general history it may be stated thus: There is a colliery owner in the south of Wales who is anxious to place the produce of his colliery in the most advantageous way, and to obtain a sale for the coal taken from it in the Liverpool market, as well as in other places. He enters into an agreement with certain gentlemen in Liverpool, the present respondents. I shall have to refer a little more particularly to the details of that agreement afterwards, but the outline of it is this, they are to become his agents for the sale of the coal sold in Liverpool for a period of seven years; during that time he will not employ any other agent in Liverpool to sell his coal, and, during that time, they will not act as agents without his consent for the sale of any other steam coal; they are to be paid a price for their services by a percentage upon the value of the coal sold, and for that price they are to undertake all the expense, of an office, and of advertising and commending the coal to purchasers, which may have to be incurred in Liverpool.

My Lords, the employment commences upon that footing, and the case finds clearly that the respondents were at considerable expense in bringing the coal into the Liverpool market, and before the notice of purchasers. As a matter of course that expense would naturally be incurred to a greater extent in the earlier part of the

term of seven years than in the latter part. The employment therefore during the earlier part of the seven years would naturally be expected to be less remunerative than during the latter part of that period. The employment went on for about three years and a half. At the end of that time the appellant sold his colliery, and, therefore, of necessity, no more coal could come to the Liverpool market with regard to which he would be the principal and the respondents his agents. That, of course, was a considerable hardship upon the respondents for the reason that I have mentioned. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But although that is a hardship upon them which naturally one would regret to see occur, still the question remains what was the contract entered into between the parties, and has there been, in what has been done, any violation of that contract.

My Lords, it is not contended that there has been any violation of any express term in any part of the contract. There is no express term in the contract from beginning to end that the appellant, the colliery owner, would send any coal to Liverpool, or any particular quantity of coal to Liverpool, or that he would continue for any particular length of time to send coal to Liverpool. As regards express contract, there is a complete absence of anything of that kind.

But then it is contended that there is an implied contract under which the appellant was bound to send coal to Liverpool, and that he has disabled himself from performing that implied contract by selling the colliery out of which the coal might have come. My Lords, that requires your Lordships to look at the whole contract, and to discover, if you can, whether there is any such implied contract as is suggested.

Now the general effect of the contract is this: Your Lordships will observe that it commences in this way, that "for the term of seven years" "Paton & Forwood, or such of them as shall continue to carry on business in the name of that firm at Liverpool, shall and will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca Collieries." I stop there for the purpose of saying that that obviously is, and indeed it was admitted to be, not a contract that they would be the agents of

Rhodes for the sale of Risca coal of all kinds wherever the sale should take place, but that they would by the agents for the sale in Liverpool of such of the coal as was sold in Liverpool; and, farther, that it is obviously a contract that they will be the agents of Rhodes for the sale of coal which is produced at the Risca Colliery while the Risca Colliery is his property, because if it is the property of another person they could not be the agents of Rhodes for the sale of coal which did not belong to Rhodes.

Farther than that, the contract is that they will thus be the agents of Mr. Rhodes for seven years with this important qualification, "Subject nevertheless to the determination of such agency in manner hereinafter mentioned." You are therefore informed at the commencement that although there is a fixed term stated, namely, seven years, means are provided in a subsequent part of the contract for terminating the agency.

Then there are two engagements, one upon the side of Rhodes and the other upon the side of Forwood, and they are the only two express engagements which I find in the contract. With regard to Rhodes, the express engagement on his part is in the second clause, "During the continuance of such agency, Mr. Rhodes will not employ any other agent for the sale of coals in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement." That is all which he actually and openly contracts for.

He ties his hands against having any other agent for the sale of coal in the port of Liverpool. The express contract on the part of Forwood, Paton & Co., is in the fourth paragraph: "Forwood, Paton & Co. will not during the continuance of their agency act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes, to be obtained for each transaction." It is a correlative contract on their part, negative also in its aspect, that, as he will not employ any other agent, so they will not act for any other principal. Now I ask your Lordships at this point to consider if the contract had stopped here, what would have been the result? Both parties would have been tied and bound for seven years, the one not to employ another agent, the other not to act for another principal.

Then it appears to have occurred to them, naturally enough, to consider—but what if the agency produces no fruit to the agents? Or what if the agents are not able to act with the energy which the principal expects? Is this state of things to go on for seven

years in this case? And then to deal with that your Lordships find that the 7th clause is introduced, providing that if "during the first or any subsequent year of the agency hereby created" Forwood, Paton & Co., "shall not have *bona fide* sold 50,000 tons of coal on Mr. Rhodes' account, in conformity with the terms of this contract" (that is to say, sold at prices of which the principal would approve), "it shall be lawful for Mr. Rhodes, at any time prior to the 1st day of May in the ensuing year, to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect." And on the other hand, "in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal not exceeding" (not 50,000 tons, but) "75,000 tons in all in any one year which may have been sold on his account, in conformity with the terms of this contract (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. Forwood, Paton & Co. in like manner to determine their agency." Therefore, there is not an absolute contract to employ no other agent during seven years, and an absolute contract to act for no other principal for seven years, but a contract of that kind subject to determination in the manner mentioned, the mode of determination being that which I have read, a power to the principal to resile if his agent cannot sell at prices approved by him, 50,000 tons of coal in the year, and a power to the agent to resile if the principal cannot supply him in any year with 75,000 tons of coal which can be sold at those prices.

That is the protection which the parties have provided for themselves with reference to the duration or the continuance of this agreement. Now, I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what, it is admitted, is not found expressly there, namely, an engagement that during that time the principal will not disable himself from sending coals to Liverpool by selling his colliery to any other person? This question is asked by Mr. Manisty: Can you assume that the agents intended to leave open the right to sell the colliery without any assent on their part? My Lords, I should ask, in answer to that, another question: Can you assume that the principal, the colliery owner, meant to tie his hands for seven years against selling the colliery without either obtaining the consent of the agents, or without paying them a gross sum, the equivalent for all the profits they might make by the continuance of the engagement dur-

ing the seven years? My Lords, if it was the intention that there should be an implied undertaking of that kind, how inconsistent would that have been with the express clause which I have read, the 7th clause, providing expressly in the events which are there mentioned for the determination of the agreement.

Now, my Lords, as I pointed out in the course of the argument, there are really in this agreement several risks which are left altogether uncovered, and as to some of which it was very candidly admitted by the counsel for the respondents that no provision whatever was made, and that they could not say that there was even by implication any protection against those risks. I will remind your lordships of what those risks are. On the one hand, in the first place, the colliery owner, the appellant, might sell the whole of his coal at ports other than Liverpool, and not send a single ton to Liverpool. That is admitted on the part of the respondents. They do not challenge that proposition. They say that that is an infirmity in the engagement between the parties. The agents could not have demurred or complained if every ton of this coal raised during the seven years at the Risca colliery had been sold at Swansea, or at Southampton, or at any other port which might be suggested. In the next place, the coal might have been sent to Liverpool, but the principal might have taken a view with regard to the price to be obtained for it which would have led him to place limits upon the coal, such as to prevent the agents selling any of it in any one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to hold the coal and wait for better prices.

There, again, it is admitted that that was in the power of the principal, and that the agent could not have complained. Then, again, I asked the question: Supposing the colliery owner had, by reason of difficulties arising with the workers or otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times or a more easy mode of working, could the agents have complained? It was said they could not; that the colliery owner must be judge of that. He might have taken that course without exposing himself to any proceedings for damages.

But if that is so, if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched

at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool, if all that was in the power of the colliery owner, and it could not be contended that there is any provision in this contract against any of those risks, why is it to be assumed with regard to the other, the fourth risk, namely, the risk of the colliery owner, not selling his coal elsewhere piecemeal, but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it is admitted that there is no undertaking at all against any of the other risks?

My Lords, in point of fact an agreement of this kind, obviously, is made upon the chances of risks of the sort I have referred to, and none of which is expressed in the agreement. That which is in the mind of the parties, the principal on the one hand and the agents on the other, is supposing it to be convenient that the business should go on and the coal find its way to the port of Liverpool, all that we require to stipulate for is that, on the one hand, the principal should have the security that his agents will be sufficiently energetic to sell a certain quantity of coal in the year, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put in their hands for sale to terminate the engagement.

My Lords, it is obvious, now that the result is seen, that it would have been a much wiser thing if both parties, or at all events if the agents, in place of stipulating for a mode of terminating the agreement which required to work it out the lapse perhaps of a year or eighteen months, had stipulated for a more speedy power of terminating the agreement, and for the power of taking coal for other people as agents, supposing the coal of the Risca Colliery was not sent to them. That, however, was for them to judge of. Your Lordships cannot reform an agreement because in the result it appears to produce consequences which possibly may not have been expected.

The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated: Can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery entire. Therefore I am obliged to arrive at the conclusion that the decision of the Court of Exchequer was correct, and that judgment in the action should be given as the Court of Exchequer gave it, for the defendant.

Lords CHELMSFORD, HATHERLY, PENZANCE and O'HAGAN delivered concurring opinions.

Reversed.

NOTE—See, also, *Burton vs. Great Northern Ry. Co.*, 9 Ex. 507; *Churchward vs. The Queen*, L. R. 1 Q. B. 173; *Ex parte Maclure*, L. R. 5 Ch. 737; *Aspdin vs. Austin*, 5 Q. B. 671; *Dunn vs. Sayles*, 5 Q. B. 685; *Orr vs. Ward*, 73 Ill. 318; *McArthur vs. Times Printing Co.*, *ante*, —.

(LAW REPORTS, 1891, 1 QUEEN'S BENCH DIVISION, 544.)

TURNER vs. GOLDSMITH.

(English Court of Appeal, January, 1891.)

The defendant, a shirt manufacturer, by contract in writing, agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant as agent, canvasser, and traveler on the terms—first, that the agency should be determined by either party at the end of five years by notice; secondly, that the plaintiff should do his utmost to obtain orders for and sell the various goods "manufactured or sold by the defendant as should from time to time be forwarded or submitted by sample or pattern to T." And it was further provided that the plaintiff should be remunerated by such commission as was specified in the contract. After about two years the defendant's manufactory was burned down and he did not resume business, and thenceforth did not employ the plaintiff, who brought an action for breach of contract.

Winch, Q. C., and *H. Kisch*, for the plaintiff.

E. Bullen, for the defendant.

LINDLEY, L. J. This is an action for breach of contract in not employing the plaintiff for the period of five years. The contract turns upon the construction of the agreement entered into by the parties, and the application of it in the events which have happened. The plaintiff wished to act as traveler to the defendant, and the defendant wished to engage him in that capacity. An agreement, dated January 31, 1887, was entered into between them, which contained this recital:

"Whereas, in consideration of the agreement of the said A. S. Turner, the said company" (*i. e.*, Mr. Goldsmith, and any partner

he might have) "agree to employ the said A. S. Turner as their agent, canvasser, and traveler, upon the terms and subject to the stipulations and conditions hereinafter contained; and in consideration of the premises the said A. S. Turner hereby agrees with the said company that he, the said A. S. Turner, shall and will diligently, faithfully, and honestly serve the said company as their agent, canvasser, and traveler, upon the terms and subject to the stipulations and conditions hereinafter contained."

Stopping there we have a clear agreement by the company to employ the plaintiff, and by the plaintiff to serve the company—and on what terms? 1. That the agency shall commence as from January 31st, 1887, and shall be determinable either by the company or Turner at the end of five years from the date of the agreement upon giving such notice as therein mentioned. 2. "The said A. S. Turner shall do his utmost to obtain orders for and sell the various goods manufactured or sold by the said company as shall be from time to time forwarded or submitted by sample or pattern to him at list price to good and substantial customers." Clause 5 is only material because it repeats the words "manufactured or sold by the said company." The 8th clause provides for the plaintiff's remuneration by a commission on the goods sold by him. The other clauses are not material as regards the question before us.

It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission.

The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it. The plaintiff then says, "I am entitled to damages for your breach of the agreement to employ me for five years." The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to

manufacture or sell. How, then, can such a condition as the defendant contends for be implied?

It was contended that the point was settled by authority. I will refer to three cases on the subject. In *Rhodes vs. Forwood*, 1 App. Cas. 256, (*ante*, ——) it was held that an action very similar to the present was not maintainable. But that case went on the ground that, there not being any express contract to employ the agent, such a contract could not be implied. In the present case we find an express contract to employ him.

In *Cowasjee Nanabhoy vs. Lallbhoy Vullubhoy*, Law Rep. 3 Ind. App. 200, there was a contract in a partnership deed to employ one of the partners during his life as sole agent to effect purchases and sales on behalf of the partnership at a commission upon his sales. The partnership was dissolved by decree of the High Court of Bombay on the ground that the business could not be carried on at a profit. It was held that the employment was to sell on behalf of the partnership; that, the partnership having come to an end, the employment ceased, and that the partner could not claim any compensation, for that a contract to carry on the partnership during the claimant's life under all circumstances could not be implied.

Taylor vs. Caldwell, 3 B. & S. 826, 833, contains some observations which are very much in point. BLACKBURN, J., there says: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. * * * But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which we think establish the principle, that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

The substance of that is, that the contract will be treated as subject to an implied condition that it is to be in force only so long as a certain state of things continues, in those cases only where the parties must have contemplated the continuing of that state of things as the foundation of what was to be done. Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action, therefore, in my opinion, is maintainable.

The plaintiff, then, is entitled to damages, and in my opinion not merely to nominal damages; for, if I am right in my construction of the agreement, he has suffered substantial loss. We think, however, that £125 is too much, and the plaintiff's counsel having agreed to take our assessment of damages rather than be sent to a new trial, we assess them at £50, and direct judgment to be entered for the plaintiff for that amount.

KAY and LOPES, L. JJ., concurred.

(61 MISSOURI, 534.)

LEWIS vs. ATLAS MUTUAL LIFE INSURANCE COMPANY.

(Supreme Court of Missouri, January, 1876.)

Appeal from St. Louis county circuit court.

Martin & Lockland, for appellant.

Cline, Jameson & Day, for respondent.

WAGNER, J., delivered the opinion of the court. This was an action to recover damages for breach of a contract of agency. By virtue of the contract the plaintiff became the general agent of the defendant for the state of Illinois, for the term of five years. By the provision of the contract the plaintiff agreed to work exclusively for the company during its continuance. He was also bound to work the territory with a full corps of energetic and reliable agents. He had all the authority of a general agent in soliciting insurance and collecting premiums. His remittances were to be on the 10th of each month, at the time of his monthly reports. As

a compensation for his services and expenditures, he was to have 35 per cent on first premiums, prior to July 1, 1870, and 30 per cent after that, ten per cent on term insurance and paid up policies, and ten per cent on all renewals. These premiums on renewals were to be paid to him and his heirs after the expiration of the five years, provided he continued to be the agent of the company for that term, and performed the conditions of the contract required of him. He was also to have $250 per year, for rent of office at Springfield, Illinois.

It is averred in the petition that the plaintiff discharged the duties of the contract devolving upon him, until the 2d day of March, 1872, at which time the defendant discontinued its business in Illinois, and failed and refused to permit plaintiff to further prosecute the duties as agent there; that on the 24th of April, 1872, the defendant voluntarily sold and transferred the whole of its business and its assets to the St. Louis Mutual Life Insurance Company, thereby discontinuing its business and depriving itself of the power to keep and perform its part of the contract.

The answer denies the breaches, and also sets out, as an excuse for the discontinuance of its business in Illinois and elsewhere, that on account of the insufficiency of its assets and property, it was unable to comply with the laws of Illinois and Missouri, and that on the 24th of April, 1872, it caused all its policies to be re-insured in the St. Louis Mutual Life Insurance Company, and that the plaintiff sanctioned the re-insurance. The evidence showed conclusively, and about that there is no question, that the defendant discontinued its business in Illinois on the 2d of March 1872, and that it sold out entirely to the St. Louis Mutual Life Insurance Company on the 24th of April, 1872.

It was an unqualified sale of all its property and rights. The cause was tried before the circuit court with a jury, and a verdict was found for the plaintiff, upon which judgment was rendered. At general term this judgment was reversed, and plaintiff prosecuted his appeal to this court.

There are but two questions arising on the record of any importance, and the first is, whether the insolvency and inability of the company to carry on its business, is any legal excuse for the breaches of the contract; and the second relates to the measure of damages. The court held, by its instructions, that the inability of the defendant to continue its business, was no excuse for its breach of contract with the plaintiff.

It appeared at the trial that the plaintiff was only permitted to conduct his agency about half the time agreed upon by the stipulation. During that time he procured a large number of policies and the annual renewals were shown to be very valuable.

It is now argued on behalf of the defendant, that by the terms of the contract sued on, the plaintiff was merely appointed agent for the company, for the period of five years, and, as the company did not expressly bind itself to continue in business for that length of time, that its inability to act and execute the whole stipulation on its part, constituted no breach. It is true there was no positive and direct covenant on the part of the company to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the term of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound; for mutuality was essential to the validity of the agreement.

It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract, will be necessarily implied. (*Pordage vs. Cole*, 1 Wm. Saund. 319; *Churchward vs. The Queen*, 6 B. & S. 807; *Black vs. Woodrow*, 39 Md. 194.) When the plaintiff bound himself to give his exclusive services to the defendant for the period of five years, there was a correlative and corresponding obligation upon the part of the defendant, to give him employment and allow him to pursue and execute the terms of the contract. This was manifestly the intention of the parties. The defendant's insolvency or inability furnished no excuse for its breach of the contract. Had it desired to be exempted from liability in such an event, it should have stipulated for the exemption upon the happening of the contingency.

The criterion of damages would be to ascertain how much the plaintiff has lost by the defendant's breach of the contract. Upon

the trial it was shown how much he had realized during the existence of the contract, and the estimate in the verdict seems to have been placed upon the past actual earnings, together with the testimony of actuaries as to what probably would be the value of the renewals on policies already obtained. A custom or usage has sprung up, and exists with insurance companies, by which adjustments are made as to the value and renewals of policies for any given length of time. By the use of statistical tables and comparisons, a remarkable degree of accuracy is obtained, and where a connection ceases between an agent and the company, it is the only mode of ascertaining or adjusting the agent's interest. The calculation by the actuary has been reduced to scientific principles, and it must be resorted to, else there would be a failure of justice on one hand, or on the other, the damages would be purely speculative.

In *Ensworth vs. The New York Life Ins. Co.*, 7 Am. Law. Reg. (N. S.) 332; s. c. 1 Bigel. Ins. Cas. 645, an action was brought against an insurance company by the agent for breach of contract, whereby the company agreed to give the agent a certain percentage on renewals of policies while they continued in force. It was held that the action was sustainable, and that the probable duration of the policies might be proved; and a judgment was given for the full value of the commissions on the renewal of premiums to become due, during their estimated probable life time, after deducting the costs of collection.

The plaintiff was permitted to show the amount of his collections from time to time, from July 1, 1869, to March 1, 1872, and the amount of his commissions during that time, both in the aggregate and per month on the average. These commissions were all paid, and it is evident from the amount of the verdict, that the jury must have considered the commission on premiums for the above named period as a fair criterion of what plaintiff would have earned in the future, had the contract not been broken. Without some other evidence of the probable amount of the business, these damages would be too much of a speculative character. The new business might depend on various circumstances and be affected by numerous contingencies, and these should be shown as entering into the computation of damages.

The court refused to allow the defendant to show that the plaintiff had made a contract with another insurance company, and had entered into its service shortly after he ceased to be agent

for the defendant. It was competent for the plaintiff to recover what he had lost by reason of the breach of the contract, for the residue of the term of his agency, but the defendant should have been allowed to show in mitigation of damages, what he was making in another company during the remainder of the time covered by the contract.

For this reason we affirm the judgment.

(84 GEORGIA, 714, 8 L. R. A. 410.)

STANDARD OIL COMPANY vs. GILBERT.

(Supreme Court of Georgia, March, 1890.)

Action on account against Gilbert & Co., and plea of set-off, with prayer for judgment for the excess claimed of plaintiff's demand. Verdict in favor of the defendants for that excess. The decision states the facts of the case.

Denmark, Adams & Adams, for plaintiff.

Garrard & Meldrim, for defendants.

BLECKLEY, C. J. There was no dispute or controversy as to the facts. Their legal significance, nothing else, was for determination, the parties having agreed that the only question should be whether the contract could be terminated before October 1st by the notice of December 15, 1886. The presiding judge decided this question in the negative, and directed a verdict accordingly. The notice referred to, dated December 15, 1886, was in these terms: "Owing to the present low prices of oil, and the possibility of a continuance of the same, we cannot, after December 31, 1886, continue to allow you $75 per month rebate, as heretofore. We solicit a continuance of your orders, and will be glad to allow you jobbers' rebate, the same as we are now paying the other merchants." The contract between the parties, as originally made, was in writing. It bore date October 1, 1880.

The obligations which it imposed on the agents (Gilbert & Co.) were these: (1) To sell coal oil for their principals at such prices as the latter might fix from time to time; (2) to handle no other oil for the period of one year from the date of the contract; (3) to

receive the oil at their wharf and store it in their warehouse without charge for wharfage or storage; (4) to pay on the 10th of each month for all oil sold during the previous month. The obligations imposed upon the principals were: (1) To pay to the agents $75 per month for one year from the date of the contract; (2) to keep them supplied with merchantable oil at all seasons of the year; (3) to deliver the oil at their wharf or warehouse; (4) to pay them one dollar per barrel on the excess, if any, over 900 barrels sold by them during the year for which the agreement was made. Within a month or two after the year expired, the contract was renewed, as the result of written correspondence, for a second year, terminating October 1st, 1882. No subsequent negotiations took place, but the parties continued to deal in harmony with the terms of the written contract through all subsequent years up to December 15, 1886, when the notice above recited was given. Afterwards, and until October of the following year, their dealings went on, but the oil sent during that period was furnished and received without prejudice to the claim of either party. The credit of $75 per month in the oil account, as kept by the principals, ceased with December, 1886; and from that time forward the credits entered as rebates amounted in the aggregate to only $18.84. In other words, compensation for nine months, which according to the written contract would be $675, was reduced to $18.84. To which of these sums were the agents entitled? According to its letter, the notice did not seek to terminate the contract in any respect except as to the amount of compensation.

It merely warned the agents that the principals would not pay as they had done theretofore, but would substitute the ordinary rebates allowed the trade. It did not propose to discharge the agents from any of their obligations, which, as we have seen, were not to handle any other oil, to receive and store without charge, and to pay unconditionally on the 10th of each month for all oil sold during the previous month. It admits of no doubt that the notice thus construed would not be effective for any purpose. But construing it, as both parties probably did, to be an effort to terminate the agency altogether, and to release both parties from any and all obligations as to future dealings after January 1st, 1887, the question is, was there a legal right so to do? We think not. It is clear that during the first or second year both parties were bound, not from month to month only, but throughout the year,

as there was an express undertaking on the part of the oil company to keep the agents supplied with oil at all seasons of the year, and to pay them $75.00 per month for one year. The case does not fall within the principle of such cases as *Burton vs. Great Northern R'y Co.*, 9 Exch. 507; *Rhodes vs. Forward*, L. R. 1 App. Cas. 256 (*ante* ——); and *Orr vs. Ward*, 73 Ill. 318, in which it was ruled that it was not obligatory on the employer to furnish business to the agent or employé throughout the whole period embraced in the contract, the reason of such ruling being that the employer had not stipulated so to do. Here, on the contrary, the stipulation was no less express on behalf of one party than of the other.

If such a notice as we are considering would not have dissolved the engagement pending the first or second year of the service, it could not have that effect pending the seventh year unless, by reason of not having been expressly renewed or continued after the second year, it ceased to be a contract for a whole year and became indefinite as to time, or a contract at will only. Tested by the law of ordinary hiring, or of master and servant, there can be no doubt that services rendered without a new agreement after the contract term has expired are to be compensated at the same rate, and to that extent the prior contract is renewed or continued in force. *N. H. Iron Factory vs. Richardson*, 5 N. H. 294; *Wallace vs. Floyd*, 29 Pa. St. 184, 72 Am. Dec. 620; *Ranck vs. Albright*, 36 Id. 367; *Nicholson vs. Patchin*, 5 Cal. 474; *Vail vs. Jersey, etc., Co.*, 32 Barb. 574; *Weise vs. Board of Supervisors*, 51 Wis. 564. And where the term of employment does not exceed one year, the authorities seem to us decisive that the prior contract is renewed or continued for an equivalent time, as well as at an equal rate. "Where the hiring is under a special agreement, the terms of the agreement must of course be observed. If there be no special agreement, but the hiring is a general one without mention of time, it is construed to be for a year certain. If the servant continue in the employment beyond that year, a contract for a second year is implied, and so on." Smith's Mer. Law, 266; same by Pomeroy, sec. 508. "Where a person has been employed by another for a certain definite term at fixed wages, if the services are continued after the expiration of the term in the same business, it is presumed that the continued services are rendered upon the same terms; but this is a mere presumption, which may be overcome by proof of a new contract, or of facts and circumstances that show that the parties in fact understood that the terms of the

old contract were not to apply to the continued services." Wood's Master and Servant, sec. 96. "A person who has been previously employed by the month, year or other fixed interval, and who is permitted to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a contrary intention, be presumed to be employed until the close of the current interval, and upon the same terms." Mechem on Agency, sec. 212. "Tacit relocation is a doctrine borrowed from the Roman law. It is a presumed renovation of the contract from the period at which the former expired, and is held to arise from implied consent of parties, in consequence of their not having signified their intention that the agreement should terminate at the period stipulated. * * * Though the original contract may have been for a longer period than one year, the renewed agreement can never be for more than one year, because no verbal contract of location can extend longer." Fraser on Mas. & Ser. 58.

This last is a Scotch authority, but on this question the law of Scotland seems to coincide with our own, and with the law of Louisiana. See *Alba vs. Morarity*, 36 La. An. 680; *Lalande vs. Aldrich*, (la.) 6 So. Rep. 28; *Tallom vs. Mining Co.*, 55 Mich. 147; *Sines vs. Supts. of the Poor*, 58 Mich. 103; *McCullough Iron Co. vs. Carpenter*, 67 Md. 554; *Tatterson vs. Suffolk Mfg. Co.*, 106 Mass. 56; *Capron vs. Strout*, 11 Nev. 304; *Beeston vs. Collyer*, 4 Bingh. 309.

In the argument notice was taken of the difference between the English and American rule as to presuming that an indefinite hiring is for a whole year. It was said that in the former country this presumption holds, but in the latter it does not. Wood's Mas. and Ser. sec. 136. We think, however, this presumption has nothing to do with the matter; for whether the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. When we have a definite term of service, no matter how we get it, subsequent service of the same kind, where no new contract is made and nothing appears to indicate a change of intention, may be referred to the previous understanding and to a tacit renewal of the engagement.

Thus far we have dealt with the question without any special reference to the law of agency as distinguished from that of master and servant generally. This was a commercial agency, compre-

hending not only personal services, but the use of a wharf for landing oil and of a warehouse for storing it; and attended with a guaranty of the proceeds of all sales, the agents being obliged to pay within ten days for the oil sold in each month. The agents, if not *del credere* agents technically, were upon the same footing as such; they had to pay for all the goods they sold. No doubt the power of revoking the agency pending a current year's business existed, but the right to revoke it without sufficient cause did not exist; and a wrongful revocation leaves the principal liable to make reparation to the agent. Mechem on Agency, §§ 209, 614, 620, 621; Code, § 2183.

Here no cause was assigned but the low price of oil and the prospect of its continuance. Neither of the parties had retired, or so far as appears, wished to withdraw from business, and according to the evidence, fifteen days' notice would be too short a time within which to make arrangement with other dealers for oil; to do that would require several months. We can see nothing whatever in the record to justify the revocation of the agency by such a notice as was given, and we agree with the presiding judge in the opinion that the oil company had no legal right to terminate the contract before October 1, 1887, without mutual consent. The engagement was one from year to year, and not merely at the will of either party. There was no contention that the amount claimed by the defendants in excess of the plaintiffs' demand was more than they ought to recover upon their plea of set-off, if they were entitled to recover at all, and the verdict being for that amount, it was correct, and the court did not err in refusing a new trial.

Judgment affirmed.

(125 UNITED STATES, 339.)

MISSOURI, EX REL. WALKER vs. WALKER.

(United States Supreme Court, April, 1888.)

In March, 1881, the General Assembly of Missouri enacted a statute authorizing the fund commissioners of the State to employ a competent agent to prosecute to final settlement before Congress and the proper departments at Washington, certain specified claims

of the State against the United States. He was to give security, prosecute the claims at his own expense and for his services was to have such commissions on the amount collected by him as might be agreed upon between himself and the fund commissioners, not to exceed a certain per centage. The commissioners appointed John R. Walker as such agent and he gave the security and entered upon the discharge of his duties. In March, 1885, the statute was repealed without any saving clause. Afterwards a claim arose of the kind contemplated by the first statute, and Walker demanded it for collection pursuant to the Act of 1881, but it was refused on the ground that that statute had been repealed. Thereupon Walker applied to the Supreme Court of the State for a mandamus on the auditor to make the delivery, on the ground that the Act of 1885 impaired the obligation of his contract with the State under the Act of 1881, and was therefore void. The court denied the writ, holding that his employment was "one of agency, pure and simple," which the State could revoke at will, as it did by the repealing act. For a review of the judgment this writ of error was brought.

Wm. M. Williams, for plaintiff in error.

B. G. Boone, Attorney General of Missouri, for defendant in error.

WAITE, C. J. (After stating the facts.) The fund commissioners were only authorized to employ an agent for the State, and to agree with him as to the commissions he should receive on the amount collected, as full compensation for his services and all expenses incurred by him in that behalf. This they did and there can be no doubt that the agency thus created was withdrawn by the repealing act of 1885, unless a consideration was given for it, or it was so coupled with an interest in the subject matter of the agency, that is to say, in the claims to be collected, as to make it irrevocable.

There was no consideration in money paid for the employment. The agreement to prosecute the claims faithfully is no more than would be implied in law from the acceptance of the employment, and the provision for the payment of expenses is only a declaration that the commissions stipulated for shall be in full for services and disbursements. There is nothing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other.

The interest implied with a power, to make it irrevocable, must be an interest in the thing itself. As was said by Chief Justice MARSHALL in *Hunt vs. Rousmanier*, 8 Wheat. 174, 204 (*post*, ——), "the power must be engrafted on an estate in the thing. The words themselves seem to impart this meaning. 'A power, coupled with an interest,' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences and therefore cannot in accurate law language, be said to be 'coupled' with it." Such is undoubtedly the rule.

Here there was no actual assignment of the claims or any part of them. Walker had no authority under his employment to take the money from the United States except to the extent of his commissions. The vouchers and evidences of debt were not turned over to him. All he could do was to present the claims in the name of the State and as its representative. He could not even get the vouchers or other evidences of debt which were necessary for the establishment of the claim, by application to the proper custodian, but must go to the governor of the State for his written order directing their delivery to him.

There is nothing whatever in the transaction, from the beginning to the end, which shows an intention on the part of the legislature to part with any interest in or control over the claims, except to the extent of the commissions of the agent after they had been earned. Walker was given no power to compromise any claim. All he could do was to establish the claim, and when the state was ready to pay it, take his commissions. Clearly such an agency is not irrevocable in law, because of its being coupled with an interest in the thing to be collected. If the vouchers and other evidences of debt had actually been delivered to him for collection, and he had expended time or money under his employment, in endeavoring to make the collection, a revocation of his authority might not require him to return the papers he held, until he was compensated for what he had already done; but that is not the question here, because the purpose of this suit is to get possession of new vouchers, not to assert a lien upon such as he already had in hand.

There is nothing in the cases of *Hall vs. Wisconsin*, 103 U. S. 5, or of *Jeffries vs. Mutual Life Insurance Company*, 110 U. S. 305, in conflict with this. In Hall's case the question was whether his employment was an office or under a contract for work and labor, and it was held to be under a contract, because although he was appointed a commissioner to make a "geological, mineralogical and agricultural survey of the state," the law providing for the survey and for his appointment required that the governor "make a written contract" with him for the performance of his allotted work, and "the compensation therefor;" and it also declared that "such contract shall expressly provide that the compensation to such commissioner shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year" as he may actually be engaged in the discharge of his duty as such commissioner. The contract actually entered into was by its terms "to continue till the third day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default."

In deciding the case it was said: "In a sound view of the subject, it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations, limited in point of time, with a state, for the erection, alteration or repair of public buildings, or to supply the officers or employés who occupy them with fuel, light, stationary, and other things necessary for the public service." There was in that case a positive contract by the State for employment in a particular service, for a particular term, made under the authority of law; and because it was such a contract the State could not, any more than a private individual, rescind it at will. The employment in this case, however, has no such provision. There is no agreement as to time, and the matter stands precisely as that of Hall would, if a statute had been passed authorizing a geological, mineralogical and agricultural survey of the State, and he had been employed to make it and receive for his services a compensation dependent on the amount of work actually done, or the time actually employed. It would hardly have been contended that under such a contract the State could not stop the survey and require Hall to quit work at any time it pleased. The difference between the two cases is the difference in the two contracts.

In Jeffries' case the contract was by an administrator of a deceased person's estate with a firm of attorneys to prosecute a doubtful claim, "for a portion of the proceeds, with full power to compromise it as they should please," and we held that such an agency was not revoked by the death of the administrator who made the contract and the appointment of another in his place. The question was as to the validity of a compromise made by the attorneys, on that authority, after the death of the first administrator. In the present case there was no authority to compromise. Walker could do nothing to establish the claim. He could not even receive the money belonging to the state after he had got the allowance of the claim by the United States.

We find no error in the record and the judgment is affirmed.

(65 MARYLAND, 359, 57 AM. REP. 331.)

NORTON vs. COWELL.

(Court of Appeals of Maryland, April, 1886.)

Robert Riddell Brown, for the appellant.

Richard Hamilton, for the appellee.

ALVEY, C. J., delivered the opinion of the court. This action was brought to recover wages alleged to be due from the appellant to the appellee on a contract of hiring.

The appellant, residing at Rio de Janeiro, in South America, was owner of certain ships, trading to and from ports in the United States; and the appellee having been in the service of the appellant for eighteen months or more prior to the 20th of August, 1883, the latter addressed to the appellee the following letter, which was given in evidence as proof of the contract of hiring sued on:

RIO DE JANERIO, 20th August, 1883.

Capt. John Cowell:

DEAR SIR: Your conduct during the last eighteen (18) months that you have been in my employ has given me great satisfaction, and now, as I put all my ships under my own flag, I appoint you superintendent of all my ships, both here and at any ports in U. S. America; and you will please help all my captains to get quick dispatch, and also see that no damaged or bad cargo is ship-

ped, as all the lumber cargo are shipped on my ac. You have my permission to take your family, or any of them, in any of my ships, whenever it may suit your convenience, from U. S. to Rio and back, and your wages will be ($100) one hundred dollars per month, with all hotel and other expenses; and if you give me satisfaction at the end of the first year, I will increase your salary accordingly. I am, dear sir, yours truly,

A. M. NORTON, Ship-owner.

It is admitted that the appellee accepted the proposal contained in the letter, and continued in the service of the appellant for about three months thereafter, under the new terms of employment, when he was discharged from further service, without legal cause therefor, as contended by him, but was paid his wages down to the time of his discharge. And having thus been illegally discharged, as contended by the appellee, he brought this action to recover of the appellant the balance of the year's wages, upon the theory that the letter, and the acceptance of the terms thereof, constituted a contract of hiring for one year, at the rate of $100 per month, and expenses, and therefore the discharge of the appellee was not justified by the terms of the contract, it being conceded that he had furnished no justifiable cause of discharge.

As the case is presented on this appeal, the only question is whether the letter in evidence, by legal construction, constituted a contract of yearly, or monthly, hiring, or a contract of hiring at will merely. The court below held, and so instructed the jury, that the letter, and its acceptance, by legal construction, created a contract of hiring for one year; and in that construction this court concurs.

As will be observed, there is no express limitation in the letter as to the term of service, though the wages were to be at the rate of $100 per month. But stipulations for the payment of wages quarterly, monthly, or even weekly, are not inconsistent with a yearly hiring. *Fawcett vs. Cash*, 5 B. & Ad. 908. For, as said by Lord KENYON, C. J., in the case of *The King vs. Birdbrooke*, 4 T. R. 245, "whether the wages be to be paid by the week or the year can make no alteration in the duration of the service, if the contract were for a year." Here the written agreement furnishes a clue to the real intention of the parties, when it says, "if you (the appellee) give me satisfaction at the end of the first year, I will increase your salary accordingly." Why, at the end of the year,

rather than at any other time, if the contract was monthly, or only at will, as contended by the appellant. This passage of the letter, taken in connection with the situation of the parties, and the nature of the service to be performed, would seem to leave no room for doubt as to what was really contemplated by the contract of employment. It would not be reasonable to suppose that it was intended that the appellee should have the right to terminate the contract at will, and thus to imperil the interests of his absent principal; and if such right was not designed to be possessed by the appellee, there is no principle that would justify the court in holding that such right could be exercised by the appellant with impunity, as there is nothing in the contract, or the nature of the employment, to indicate such want of mutuality. Being of opinion that the contract was of a yearly hiring, we shall affirm the judgment of the court below.

Judgment affirmed.

(141 UNITED STATES, 627.)

WILCOX & GIBBS SEWING MACHINE COMPANY vs. EWING.

(Supreme Court of the United States, November, 1891.)

Action by Ewing to recover damages for an alleged breach of contract by the company. Verdict for plaintiff and defendant brings error. By a contract between the parties made in May, 1867, Ewing had been the company's agent for the sale of its machines in Philadelphia and vicinity. In October, 1874, all previous contracts were abrogated and a new one entered into, of which the important parts are as follows: "The first party hereby appoints, subject to conditions hereinafter expressed, the second party its exclusive vendor for its sewing machines, parts and attachments, in and for the following named territory, to wit: the city of Philadelphia, Pa., and the adjacent country lying within a radius of ten miles from the city hall of said city. The second party hereby accepts said appointment." Then follow clauses as to territory and prices. "Machines or parts, needles or attachments counterfeiting, infringing or in any degree trespassing upon ours, or in any effect trading upon our name, must not be dealt in

or countenanced by second party, but it is hereby agreed that his time, attention and abilities must primarily be devoted to the forwarding of the interest of the party of the first part. If, for any reason, at any time the connection hereby formed shall cease, the first party shall have the right to buy back of its goods sold to second party all such goods as first party may select, first party to pay therefor same prices as charged second party."

"Second party agrees to purchase from first party during the year 1875 at least $20,000, net, worth of machines, parts and accessories, to be taken in equal monthly parts, and to be paid for as stated therein. Violation of the spirit of this agreement shall be sufficient cause for its abrogation. Permission is granted second party to trade in all former territory occupied by him until such time as first party shall form other connections for occupying the territory not contained in that designated therein as belonging to second party.

"And it is agreed and understood that this appointment or agency is not salable or transferable by second party without obtaining the written consent of first party, but such consent is to be given providing the purchaser or other person is acceptable to said first party. First party consents to renew and extend second party's note, $10,000, maturing January 23-26, 1875, for one year from said date, without interest, upon consideration of this agreement alone. All contracts or agreements made prior to the date first written alone are hereby nullified and satisfied."

In October, 1879, the company gave Ewing notice that at the expiration of sixty days it would terminate the contract, and did so, Ewing not consenting.

Wayne Mac Veagh and *A. H. Wintersteen,* for plaintiff in error.

Frank P. Prichard and *John G. Johnson,* for defendant in error.

Mr. Justice HARLAN, after stating the case, delivered the opinion of the court.

If this action was based upon the agreement of 1867, there would be some ground for holding that the company was obliged, by that agreement, to continue Ewing as agent so long as he performed its stipulations. We are only concerned, however, with the agreement of 1874, which materially differs from that of 1867, and expressly provides that all prior contracts between the parties "are hereby nullified and satisfied." It is only for a breach of the contract of 1874 the plaintiff sues. Looking at all the provisions of the last

agreement, it is clear that Ewing—although bound, while the contract was in force, to devote his time, attention and abilities, primarily, to the interests of the company, within the territory allotted to him—was not compelled to continue in its service for any given number of years, at least after 1875, or indefinitely, but was at liberty after that year, if not before, upon reasonable notice, to surrender his position and quit its service, subject to the company's right to buy back such of its goods sold to him as it might select, and for the prices at which they were charged to him. He may have been entirely satisfied with the manner in which the company acted towards him, and yet may have preferred—it is immaterial for what reason—not to remain in its service after 1875, or to continue in the business of selling sewing machines. We specify the year 1875, because Ewing agreed to purchase, during that year, $20,000 of the company's machines. But he did not bind himself to purchase any given number during subsequent years. It would be a very hard interpretation of the contract to hold that he was bound by the agreement of 1874, to serve the company within the designated territory so long as it kept the contract, and was satisfied with him as its agent. None of its provisions would justify such an interpretation.

If Ewing had the privilege, upon reasonable notice, of severing the connection between him and the company after 1875, upon what ground could a like privilege be denied the company if it desired to dispense with his services? He contends that his life, or the continuance of the company in business, was the shortest duration of the contract, consistently with its provisions, provided he did his duty. This position is untenable. His appointment was made and accepted subject to the conditions expressed in the agreement. No one of those conditions is to the effect that so long as he devoted his time, attention and abilities to the company's business, he should retain his position as its exclusive vendor, within the territory named, without regard to its wishes. If the parties intended that their relations should be of that character, it was easy to have so stipulated. The only part of the contract that gives color to the theory for which the plaintiff contends, is the part declaring that a violation of the spirit of the agreement "shall be sufficient cause for its abrogation." This clause, it may be suggested, was entirely unnecessary if the parties retained the right to abrogate the contract after 1875, at pleasure, and implies that it could be abrogated only for sufficient cause, of which, in case of

suit, the jury, under the guidance of the court as to the law, must judge in the light of all the circumstances. We cannot concur in this view. The clause referred to is not equivalent to a specific provision declaring, affirmatively, that the contract should continue in force for a given number of years, or without limit as to time, unless abrogated by one or the other party for sufficient cause. It was inserted by way of caution, to indicate that the parties were bound to observe equally the spirit and the letter of the agreement while it was in force.

There was some discussion at the bar as to whether Ewing was, strictly, an agent of the company. We think he was. He was none the less an agent because of his appointment as "exclusive vendor" of the defendant's machines within a particular territory, or because of the peculiar privileges granted to or the peculiar restrictions imposed upon him. One clause of the contract prohibits him from soliciting trade, directly or indirectly, in the territory "of other agents;" another, that he will bind "all subvendors or agents" to sustain the established retail prices of the company; and still another imposes restrictions upon the sale of his "appointment or agency." The agreement constituted him the sole agent of the company for the sale of its machines within a certain territory. It is true that the machines he undertook to sell were to be purchased by him from the company at a large discount. But he could not sell them by retail below the regular retail prices. This arrangement was the mode adopted to protect the company's interests, and to secure the plaintiffs such compensation for his services as would induce him to devote his time, attention and abilities to the company's interests. He was still a mere agent to sell such machines as might be delivered to him under the contract. We perceive nothing in the agreement of 1874 to take the case out of the general rule that "the principal has a right to determine or revoke the authority given to his agent at his own mere pleasure; for, since the authority is conferred by his mere will, and it is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer desires his aid." Story on Agency, §§ 462, 463.

So far as the company's power of revocation is concerned, the case is not materially different from what it would be if the plaintiff had agreed to sell such machines as were delivered to him at the established retail prices, receiving, as compensation for his services, the difference between those prices and the amount he agreed to

pay for them under the contract of 1874. In either case, his relation to the company would be one of agency, that could be terminated at its will or by renunciation upon his part, at least after 1875. Of course the revocation by the principal of the agent's authority could not injuriously affect existing contracts made by the latter under the power originally conferred upon him.

For the reasons stated the court below erred in not instructing the jury, as requested, to return a verdict for the defendant.

The judgment is reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.

(23 LOUISIANA ANNUAL, 395.)

JACOBS v. WARFIELD.

(Supreme Court of Louisiana, May, 1871.)

Saucier & Michinard, for plaintiff and appellee.

John H. Ilsley, for defendant and appellant.

WYLY, J. The defendant has appealed from the judgment condemning her to pay the plaintiff $2,610 for violating the contract which she made with him on the sixth day of October, 1865, and for money advanced by him for her benefit under said contract. In this contract the plaintiff was employed as an agent to superintend all the business of the defendant in the parish of St. John the Baptist, in relation to certain wild lands which the defendant owned in said parish, and he was especially authorized to take charge of and exercise general control over said property; to prevent the commission of trespass or wastes upon said lands, and to appear in court to prosecute and defend all suits in reference thereto, as occasion might require, "with the distinct understanding that no other charge shall be made by the said Jacobs for his services in taking charge of the said lands, and removing therefrom all trespassers, than one-fourth interest in the revenue derived from the sale of wood and timber cut therefrom by said Jacobs and his employés, as herein expressed, which shall be a full and adequate remuneration and compensation for all services that he, said Jacobs, may render the said Mrs. Warfield under and by virtue of this procuration."

It was further stipulated that the said agent was not to institute proceedings against any trespassers without first obtaining the written consent of the defendant; and also, that the said Jacobs was in no wise to disturb or interfere with such persons as might have the written sanction of Mrs. Warfield to be on said lands and cut and sell timber therefrom.

There was no period fixed in the act as the term for which the said Jacobs was employed.

Under this contract we think the defendant had the right to discharge her agent and employé whenever she saw fit to do so. From the evidence, we are satisfied that the plaintiff did not comply with his contract, and the defendant had good cause to discharge him. His demand for damages for breach of contract must, therefore, fail. It appears, however, that the plaintiff paid ten dollars to an attorney and twenty-five dollars costs in a suit for the benefit of the defendant, and we think he was justifiable in doing so under the act of procuration. For these sums he should have judgment. The demand for the other sums which the plaintiff claims to have paid for the defendant pursuant to the contract is not supported by the evidence.

It is therefore ordered that the judgment herein be reduced to thirty-five dollars, and as thus amended that it be affirmed. It is further ordered that the plaintiff pay costs of this appeal.

Rehearing refused.

(34 MINNESOTA, 98.)

AHERN vs. BAKER.

(Supreme Court of Minnesota, July, 1885.)

Linden & Williams, for appellant.

Berryhill & Davison, for respondent.

VANDERBURGH, J. The defendant, on the 9th day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land, the authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was

consummated by a conveyance. Subsequently, on the 10th day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject matter, or the determination of his estate by a sale, as well as by express notice. The plaintiff had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent, the plaintiff took the risk of the revocation of his agency. 1 Pars. Cont. 71.

Order affirmed and case remanded.

(42 WISCONSIN, 311, 24 AM. REP. 415.)

DIERINGER vs. MEYER.

(Supreme Court of Wisconsin, August, 1887.)

Action for damages for breach of a contract of service. The plaintiff was employed for the year 1875 by the defendant to superintend the latter's lumber and wood yard. In June of that year, defendant discharged plaintiff and paid him to the time of such discharge. Plaintiff claimed to recover the agreed wages for the remainder of the year, or from the time of the discharge until he obtained other employment.

At the trial the evidence tended to show that plaintiff, while so in defendant's employ, carried on the wood business on his own account. The jury were instructed, among other things, that "the plaintiff had a right to be interested in any kind of business, but his interest in such business must not in any way interfere with his time and attention to the business of his employer." The plaintiff recovered in the action, and defendant appealed.

D. Babcock and *David Taylor,* for appellant.

Shepard & Shepard, for respondent.

LYON, J. It is well settled that if a servant, without the consent of his master, engage in any employment or business for himself or another, which may tend to injure his master's trade or business, he may lawfully be discharged before the expiration of the agreed term of service. This is so because it is the duty of the servant, not only to give his time and attention to his master's business, but, by all lawful means at his command, to protect and advance his master's interests. But, when the servant engages in a business which brings him in direct competition with his master, the tendency is to injure or endanger, not to protect and promote, the interests of the latter. It was said by Lord ELLENBOROUGH, in a discussion on this subject in *Thompson vs. Havelock,* 1 Camp. 527, that "No man shall be allowed to have an interest against his duty." Manifestly, when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty. It would be monstrous to hold that the master is bound to retain the servant in his employment after he has thus voluntarily put himself in an attitude hostile to his master's interests.

The fact may be, in certain cases, that notwithstanding the servant has engaged in a rival business, still he has given his whole time and attention to the business of his master. An attempt was made to show that this is such a case. But the existence of that fact will not take a case out of the rule above stated, for the reason that the servant would yet have an interest against his duty.

The cases which sustain or tend to sustain the doctrine here laid down are very numerous. For convenience we cite a few of them: *Singer vs. McCormick,* 4 W. & S. 265; *Jaffray vs. King,* 34 Md. 217; *Adams Express Co. vs. Trego,* 35 Id. 47; *Lacy vs. Osbaldiston,* 8 C. & P. 80; *Read vs. Dunsmore,* 9 Id. 588; *Nichol vs. Martyn,* 2 Esp. 732; *Gardner vs. McCutcheon,* 4 Beav. 534; *Ridgeway vs. Market Co.,* 3 Ad. & E. 171; *Amor vs. Fearon,* 9 Id. 548; *Horton vs. McMurtry,* 5 Hurl. & N. 667. See, also, Wood on Master and Servant, § 116, and cases cited in notes.

If the plaintiff became engaged in a business which necessarily made him a competitor of his employer in the purchase of wood at

New Cassel, or in selling the same at Fond du Lac, such business had a direct tendency to raise the price at the former place and depress it at the latter, as well as to decrease the defendant's business; and hence its tendency was hostile to the defendant's interests, and it was equally hostile, even though the plaintiff conducted it entirely by agents, and gave his whole time and attention to the business of the defendant.

The learned circuit court charged the jury, in effect, that it was no valid cause for discharging the plaintiff before the expiration of the term for which he was employed, that he engaged, in such rival and hostile business, if he gave his whole time and attention to the business of the defendant. Within the rules of law above stated, this instruction was erroneous, and the verdict may have been predicated upon the instruction and controlled by it. Hence the error is material, and fatal to the judgment.

As to whether the contract of hiring was or was not for a specified term of service, we express no opinion upon the evidence; but we have decided the case on the theory that there was a hiring for a year, that being the most favorable to the plaintiff.

By the court—Judgment reversed, and cause remanded for a new trial.

NOTE.—See *Orr vs. Ward*, 73 Ill. 318. On right to terminate for agent's misconduct, see *Callo vs. Brouncker*, 4 C. & P. 518; *Atkin vs. Acton*, Id. 208; *Bixby vs. Parsons*, 49 Conn. 483, 44 Am. Rep. 246; *Phillips vs. Foxall*, L. R. 7 Q. B. 666; *Newman vs. Reagan*, 65 Ga. 512; *Pearce vs. Foster*, 7 Q. B. Div. 536, 38 Eng. Rep. (Moak) 499; *Shaver vs. Ingham*, 58 Mich. 649, 55 Am. Rep. 712; *Drayton vs. Reid*, 5 Daly. (N. Y.) 442; *Physioc vs. Shea*, 75 Ga. 466.

(82 ALABAMA, 452, 60 AM. REP. 748.)

BASS FURNACE CO. vs. GLASSCOCK.

(Supreme Court of Alabama, December, 1886.)

This was an action brought by Glasscock against the furnace company to recover damages for an alleged breach of a contract of employment. Verdict for plaintiff and defendant appeals. The opinion states the facts.

Walden & Sons, for appellant.

Matthews & Daniel, contra.

SOMERVILLE, J. 1. The first portion of the charge given by the court, to which exception is taken, raises the inquiry, under what circumstances an employer is justified in discharging an employé from his service on the ground of drunkenness. The plaintiff was employed by the defendant company, to reduce to charcoal, or as expressed by the witness, to "coal" the wood on a tract of land owned by the company, for which he was to be paid wages at the rate of fifty dollars per month. The evidence tends to show that the plaintiff, a short while before his discharge, was drunk on the premises of the defendant, where an iron furnace was in process of operation, about four miles away from "the coaling," as it is called, and, while so intoxicated, he there "raised a disturbance and had a fight with a man." At another time, he was seen "drunk, in a wagon with some negro women, going towards the coaling." This is all that is shown by the evidence bearing on this point, no details being given. The court charged the jury, that "the fact that the plaintiff was drunk once, or a number of times, at the furnace or elsewhere, during his employment under the contract, is no evidence against the plaintiff's right of recovery, unless the drunkenness incapacitated and caused the plaintiff to fail in his part of the contract." Is this a correct statement of the law on this subject?

To justify an employer in discharging a servant, or employé, the rule, no doubt, is that the servant must have been guilty of conduct which can be construed to be a breach of some express or implied provision in the contract of service. It seems to be settled, that it is an implied part of every contract of service, that the employé will abstain from habitual drunkenness, or repeated acts of intoxication, during the period of his employment. If he be guilty of this indulgence, his conduct will justify his dismissal. 2 Addison on Contracts (Morgan's Ed.) sec. 890; *Wise vs. Wilson*, 1 Car. & K. 662; 2 Parsons on Contracts, 36, note (f); *Gonsolis vs. Gearheart*, 31 Mo. 585; *Huntington vs. Claflin*, 10 Bosw. (N. Y.) 262. There may be circumstances, however, under which a single act of drunkenness would warrant a servant's discharge; as for example, in the case of a minister of the gospel, where the act might bring personal reproach, and tends to degrade the moral standard of religion; or of a family physician, where it might result in negligence, or malpractice in pharmacy or surgery. Wood on Master

and Servant, sec. 111, p. 213. The same act when committed by a day laborer, in privacy, and when off duty, or on some rare occasion when great temptation was presented, might not be a sufficient excuse for his discharge. The rule is stated by a recent author to be, that "intoxication, while in service, is generally a good excuse for discharging a servant, particularly when it is habitual, and interferes with the discharge of his duties, or will be likely to. But it is held, that as to whether it is to be regarded as a proper excuse, depends upon the occasion." Wood on Master and Servant, sec. 111, p. 213.

We do not doubt that public drunkenness of any employé, while in the service of his employer, and manifesting itself in boisterous and disorderly conduct either towards the employer or third persons, is such misconduct as to constitute a violation of the stipulation, implied in every contract of service, that the employé will conduct himself with such decency and politeness of deportment as not to work injury to the business of the employer. This he can do by a single act of drunkenness, which may tend to offend the reasonable prejudices or tastes of the public, or impair their confidence, or render him disagreeable in social or business intercourse. The drunkenness of employés may well deter the patrons of any business establishment from continuing their business intercourse with it, especially when social contact is frequently necessary to its consummation. It may prove, also, equally offensive to the master or employer, who may justly regard sobriety as an indispensable element of efficient service. The charge of the court laid down the rule, that no drunkenness justified the plaintiff's discharge, unless it incapacitated him, and caused him to fail in the performance of his part of the contract. This, under the principles above declared, was erroneous, and must work a reversal of the cause. * *

Reversed and remanded.

(66 NEW YORK, 301.)

CLAFLIN vs. LENHEIM.

(New York Court of Appeals, June, 1876.)

Action to recover for merchandise alleged to have been sold by plaintiff to defendant. The opinion states the facts. Judgment for defendant and plaintiffs appealed.

A. J. Vanderpoel, for appellants.

A. G. Rice, for the respondents.

RAPALLO, J. The plaintiffs seek to recover in this action the price of certain merchandise which they allege that they sold and delivered to the defendant, through his brother H. S. Lenheim, as his agent.

To establish the agency, they proved that this brother of the defendant had, for several years prior to July, 1867, conducted the business of a store at Meadville, Pennsylvania, in the name of the defendant, and had been in the habit of purchasing goods for that store from the plaintiffs. These purchases were all made in the name and on the credit of the defendant, and the bills thereof were rendered to and paid by him.

The defendant concedes, in his testimony, that previous to a fire which took place in July, 1867, in the store at Meadville, his brother was authorized by him to make purchases and carry on that store in his, the defendant's name, but contends that after the fire he terminated such authority. The purchases for which this action was brought were made by the brother, for the Meadville store, in November and December, 1869, in the name of the defendant. The plaintiffs claim that they had no notice of the revocation of the agency, and sold on the credit of the defendant.

The last bill paid by the defendant for goods sold for the Meadville store, was for upwards of $8,000, and was paid in August, 1867. It was for goods sold before the fire. There was a difficulty between the plaintiffs and the defendant about this bill. An action was brought upon it and an attachment issued against the property of the defendant, and he was required to pay the costs of these proceedings, which he did in August, 1867. The defendant had for several years previously carried on another store at Great Bend, Pennsylvania, and had been in the habit of purchasing goods

from the plaintiffs for that store; but after this difficulty he suspended all his dealings with the plaintiffs until the month of October, 1869, when he resumed his business relations with them by the purchase of goods, personally, for the store at Great Bend. In the following months of November and December, 1869, the brother made the purchases now in controversy, in the name of the defendant, for the Meadville store.

The defendant gave evidence on the trial tending to show actual notice to the plaintiffs of the revocation of the agency, after the fire of July, 1867. It was conceded that the plaintiffs had notice of the burning of the store at Meadville, but the evidence of the notice of the revocation of the agency was controverted.

The court submitted to the jury the question whether the plaintiffs had notice of the revocation, but charged that if the jury came to the conclusion "that the circumstances of the case were such, independently of the question of notice, that in fair dealing between man and man, plaintiffs should have inquired by telegraph or by letter of the defendant at Great Bend whether he continued the Meadville store, and whether the brother continued to have authority to buy goods in his name, that will end the recovery in this case;" and, further, that if the jury came to the conclusion "that no notice in fact was given and that the circumstances were such as to put the plaintiffs fairly upon inquiry as to whether that business was continued by the defendant and the brother had authority to continue it by making these purchases, that ends the responsibility on the part of the defendant." Exceptions were duly taken to the portions of the charge above quoted.

It is a familiar principle of law that when one has constituted and accredited another his agent to carry on his business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given; and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred as a fact, from

circumstances, the question is for the jury; they must determine, as a question of fact, whether the party claiming against the partnership or the principal, did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court, in the present case, properly submitted to the jury this question of fact.

But the court submitted to the jury the further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent continued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

Assuming that the doctrine of constructive notice is applicable to cases of this description, what circumstances amount to constructive notice is a question of law. Where the facts are in dispute, a mixed question of law and fact is presented, and then of course the question is to be determined by the jury, under instructions by the court, as to the effect of the circumstances which they may find to have existed. But the question whether circumstances which are undisputed, or are found by the jury, are sufficient to put a party on inquiry and thus charge him with constructive notice, is not for the jury, but for the court.

In this case, throwing out of view the evidence bearing upon the question of actual notice, there was no controversy about the facts. These were, that the store at Meadville was burnt in July, 1867, and the plaintiffs knew of the fire; that the plaintiffs brought an action and issued an attachment against the defendant for the bill then due for goods furnished to the store at Meadville; that this claim and the cost of the proceedings were paid by the defendant in August, 1867, and the defendant thereafter suspended all dealings with the plaintiffs until October, 1869, when he resumed them, and that in November, 1869, the brother resumed his purchases for the Meadville store, from the plaintiffs, on credit, in the name of the defendant, and the plaintiffs gave him credit as the agent for the defendant. Whether these circumstances were sufficient to put the plaintiffs on inquiry, or, in other words, whether they amounted to constructive notice of the fact, which an inquiry would have disclosed, viz., the revocation of the agency, was a

question of law, to be determined by the court, and it was error to submit it to the jury. *Am. Linen Thread Co. vs. Wortendyke*, 24 N. Y. 550; *Howe vs. Thayer*, 17 Pick. (Mass.) 91.

Constructive notice is a legal inference from established facts, and when the facts are not controverted, the question is one for the courts. Whether, under a conceded state of facts, the law will impute notice, is not a question for the jury. *Birdsall vs. Russell*, 29 N. Y. 220, 249.

This error, however, would not be ground for reversing the judgment if it appeared that the court would have been justified in holding, as matter of law, that the circumstances were sufficient to put the plaintiffs on inquiry, and we must, therefore, examine that question.

The mere fact that the store at Meadville was burnt did not indicate that the defendant intended to discontinue business there; and if business had been promptly resumed and purchases for that store renewed by the defendant's brother, there could have been no reason, in the absence of any notice from the defendant, to suppose that the agency had been discontinued. The principal feature in the case is the delay of two years and upwards between the fire and the resumption of purchases, by the defendant's brother, for the Meadville store. But, under the circumstances, this delay might well have been attributed by the plaintiffs to the difficulty between them and the defendant, in July and August, 1867, which resulted in the defendant suspending all dealings with the plaintiffs, notwithstanding that he continued his business at Great Bend. And when the defendant, in 1869, resumed his dealings with the plaintiffs, without giving them notice of any change in his business arrangements with his brother, at Meadville, the plaintiffs were warranted in believing that the suspension of the dealings of the brother were attributable to the same cause which had deterred the defendant himself from making purchases; and when, immediately after the defendant himself resumed dealings, the brother applied to make purchases as before, for the Meadville store, the plaintiffs would not, naturally, attribute the suspension of dealings for that store, in the meantime, to a revocation of the agency, nor suspect that the brother was committing a fraud. We must, in considering the portion of the charge excepted to, assume, as we have assumed, that no notice was given by the defendant to the plaintiffs that he had discontinued his business at Meadville or revoked the authority of his brother, and that the plaintiffs knew nothing of it,

for the charge expressly submits the question of constructive notice, independently of the question of notice in fact, and expressly states that the jury are to pass upon it in case they find that there was no notice in fact.

We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact. In this there is no hardship upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiff had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution.

The jury may have been satisfied that notice was given, but under the charge they may have rendered their verdict solely on the ground of constructive notice; the judgment must, therefore, be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

NOTE.—As to the necessity of giving notice of the termination of a general agency to third persons: *Hatch vs. Coddington*, 95 U. S. 48; *Rice vs. Barnard*, 127 Mass. 241; *Wright vs. Herrick*, 128 Mass. 240; *Tier vs. Lampson*, 35 Vt. 179, 82 Am. Dec. 634; *Baudouine vs. Grimes*, 64 Iowa, 370; *Meyer vs. Hehner*, 96 Ill. 400; *Howe Machine Co. vs. Simler*, 59 Ind. 307.

In the case of a special agency, see *Watts vs. Kavanaugh*, 35 Vt. 34; *Strachan vs. Muxlow*, 24 Wis. 21; *Fellows vs. Steamboat Co.*, 38 Conn 197.

(96 UNITED STATES, 84.)

INSURANCE COMPANY vs. McCAIN.

(United States Supreme Court, October, 1877.)

This was an action on a policy of insurance issued by the Southern Life Insurance Company, a corporation created by the laws of Tennessee, upon the life of Adam S. McCain, commencing on the 10th day of December, 1868. The insurance was for the sum of $5,000, and was effected by the wife of the insured, for the sole use of herself and children. The policy was received from an agent of the company, one B. F. Smith, who was appointed to solicit applications for policies and collect premiums for a district of country embracing a part of Mississippi and also a part of Alabama, in which the insured resided. To him the first premium was paid. The second premium, due on the 10th of December, 1869, was paid on the 5th of that month, to his sub-agent, who, before the 10th, handed him the amount, and it was credited in his account rendered to the company in April following. The account disclosed the fact that the amount was received upon the policy in question. After its receipt no communication was made by the company to the assured that Smith was not its agent at the time of the payment, nor was any objection made to the sufficiency of the payment. The insured died in June, 1870, and this action was commenced on January, 1873, in a state court, and, on application of defendant, was transferred to the Circuit Court of the United States. The proper preliminaryproof of the death of the insured was made, and the case turned upon the sufficiency of the second payment.

The company, in its defense, denied the authority of Smith to receive the premium, contending that his agency had previously ceased, under the rules and regulations of the company, by his accepting the agency of another insurance company; and, further, that its agents were only empowered to collect renewal premiums upon special receipts, sent out from the office of the company for each case, signed by its president and secretary, and countersigned by the agent. The evidence established the existence of such regulations, and tended to show that the agent had resigned his agency previous to the 1st of December. It appeared also that no renewal receipt, signed as required, was given in the case. But the court held

and in substance instructed the jury, that if Smith was the general agent of the company, and as such had authority to bind the company by a receipt of the renewal premium before the 10th day of December, 1869, a payment to him was sufficient, unless previously to such payment the assured had notice that the agent's authority had been revoked; and that though, as a general rule, a person dealing with an agent must inquire into his authority, yet that the powers of an agent were *prima facie* co-extensive with the business intrusted to his care, and would not be narrowed by limitations from his principal not communicated to the person with whom he dealt; and that, unless the assured was informed that a payment would not be good in the absence of a particular form of receipt, a payment by him within the time prescribed by the policy was sufficient, though a different form of receipt was used.

The court also held, and instructed the jury, in substance, that if the company received, in April, 1870, a statement of the agent Smith, showing the receipt by him of the renewal premium payable on the 10th of December, and the company did not notify the assured, who lived more than a month afterwards, that it repudiated the transaction, it would be a fraud on its part to repudiate the payment after his death, and that the payment would bind the company. The jury found a verdict for the plaintiff, upon which judgment was entered; and the insurance company brought the case here on writ of error.

Mr. John D. McPherson, for the plaintiff in error.

Mr. P. Phillips, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court.

The law embraced by the instructions to the jury is clearly and correctly stated. No company can be allowed to hold out another as its agent, and then disavow responsibility for his acts. After it has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until in some way informed of its revocation. The authorities to this effect are numerous, and will be found cited in the treatises of Paley and Story on agency.

The law is equally plain, that special instructions limiting the authority of a general agent, whose powers would otherwise be coextensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to

the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him. Story on Agency, sects. 126, 127, and cases there cited.

The law on the silence of the company, after receiving the statement of the agent that the premium had been paid, is also free from doubt. Silence then was equivalent to an adoption of the act of the agent, and closed the mouth of the company ever afterwards. It does not appear that the company ever objected to the payment of the premium to him until after the death of the insured. It was then too late. As pertinently said by counsel, the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died.

Judgment affirmed.

(83 NEW YORK, 378, 38 AM. REP. 441.)

SIBBALD vs. BETHLEHEM IRON COMPANY.

(New York Court of Appeals, December, 1880.)

Action for commissions. The opinion states the facts. The plaintiff had judgment below.

Albert Stickney, for appellant.

Thomas Hy. Edsall, for respondent.

FINCH, J. The evidence satisfactorily shows that the defendant employed the plaintiff to sell the steel rails of the former's manufacture to the Grand Trunk Railroad Company. The existence of such a contract was strenuously denied on the part of the appellant, but the proofs establish it and leave it without substantial contradiction. The plaintiff swears that in December, 1873, he met and was introduced to Mr. Hunt, the president of the defendant corporation, and was requested by him to use the plaintiff's exertions and interest in selling steel rails of the Bethlehem Iron Company's make, and particularly to the Grand Trunk Railway of Canada, and that the plaintiff agreed to do so if he could Hunt was afterward examined, and does not contradict this state-

ment. Indeed, he almost admits it. He says: "I presume I was introduced to Mr. Sibbald in December, 1873. I have no recollection of it. After my introduction to him I may have called upon him in his office in New York. He says I did, and I accept his statement up to his sale of 14th of April." Mr. Evans, in whose presence the conversation detailed by plaintiff took place, was also examined as a witness by the defendant. He admits the meeting on that occasion; that he introduced Sibbald to Hunt as a man engaged in selling steel rails; that several railways were named as purchasers from plaintiff, "the Grand Trunk doubtless among them;" and then he adds, "I do not remember that anything definite was said as to his selling any rails for the Bethlehem Company, but there may have been."

Upon this state of facts it is very evident that there was a general employment of the plaintiff by the defendant to sell its rails so far as he was able, and especially to the Grand Trunk Railway, with whose purchasing officers he was supposed to be in communication and to have influence. It follows that the first alleged error committed upon the trial, that the court refused a request to direct a verdict for the defendant on the ground that the plaintiff had not proved as to the transaction in suit any employment by the defendant, cannot be so regarded. The general employment was sufficiently definite and broad to have related and applied to the sale finally made, if indeed that resulted from plaintiff's influence and exertion. Nor do we see any fault in the charge of the court in this connection, that it was immaterial whether the broker was originally employed, or whether, after he had brought the thing about, the principal availed himself knowingly of the fruits of the action of the broker. This is only saying that the contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, the learned counsel for the defendant very fairly and justly concedes that the contract may be established in some cases "by a mere acceptance of the labors of a broker."

It follows also that there was no error in the further charge of the court, that the only remaining question was whether plaintiff was the producing cause of the sale. Having been employed to make it, the only remaining inquiry was of necessity whether he did make it either directly, or as its efficient and producing cause.

That inquiry brings up for our consideration what the plaintiff in fact did, and what inferences are to be justly drawn from the attendant circumstances. The question, simple up to this point, grows rapidly difficult and complicated, partly by reason of the inherent uncertainty and ambiguity of the subject itself, and partly, perhaps, because of a wide range of judicial discussion not always entirely harmonious. The learned judge who tried the case at the Circuit, in his charge to the jury, realized and explained the difficulty of applying the appropriate legal rules to the particular facts of transactions like that under discussion.

It may aid therefore to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration. The description and definition of a broker involves this view of his duty. Story says, "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage." Story on Agency, § 28, p. 25. In *Pott vs. Turner*, 6 Bing. 702, 706, a broker is more tersely and quite accurately described as "one who makes a bargain for another and receives a commission for so doing." In *Barnard vs. Monnot* it was said, that the duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement. 34 Barb. 90. In *Wylie vs. Marine National Bank*, 61 N. Y. 416, it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. In *Moses vs. Bierling*, 31 31 N. Y. 462, it was declared that the authorities clearly established the proposition that until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to his agreed commission, and that obligation is fulfilled only when he produces a party ready to make the purchase at a satisfactory price. In *Glentworth vs. Luther*, 21 Barb.

147, it was declared that the commissions were earned when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at an acceptable price.

It was not meant by these cases, and we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details, And it is to describe such instances that courts have used a different form of expression, entirely accurate in its proper application, but capable of being warped from its obvious meaning. In *Lloyd vs. Matthews,* 51 N. Y. 132, the phrase used was that the broker was entitled to reward when the sale was effected through his agency as the procuring cause. And in *Lyon vs. Mitchell,* 36 N. Y. 237, the broader language is used that his efforts must have lead to the negotiations that resulted in the purchase of the vessel. But in all the cases, under all and varying forms of expression, the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. *McGavock vs. Woodlief,* 20 How. 221; *Barnes vs. Roberts,* 5 Bosw. 73; *Holly vs. Gosling,* 3 E. D. Smith, 262; *Jacobs vs. Kolff,* 2 Hilt. 133; *Kock vs. Emmerling,* 22 How. 72; *Corning vs. Calvert,* 2 Hilt. 56; *Trundy vs. New York & H. Steam Co.* 6 Robt. 312; *Van Lien vs. Burns,* 1 Hilt. 134.

We have been thus particular in the examination and statement of the rule, because of a possible tendency growing out of a variety of circumstances and modified forms of expression, to give it an extent and meaning not at all intended.

It follows as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to

commissions. He loses the labor and effort which was staked upon success. And in such an event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would never have met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors.

As was said in *Wylie vs. Marine National Bank,* 61 N. Y. 416, in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not that sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure therefore and its consequences were the risk of the broker only. This however must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the non-performance of a condition precedent who has himself occasioned its non-performance. But this limitation is not even an exception to the general rule affecting the broker's rights, for it goes on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and fails through the after-fault of the seller. The cases are uniform in this respect. *Moses vs. Bierling, Glentworth vs. Luther, Van Lien vs. Burns, supra.*

One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the

continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. Thus, in *Satterthwaite vs. Vreeland*, 3 Hun, 152, it was held that the broker earned his commissions by making a sale on the terms fixed by the principal while the authority continued.

Judge DANIELS said, and we think correctly, that "to maintain a claim by the broker for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price for which he was empowered to sell, or that the defendant had deprived him of the opportunity to do so while the privilege lasted." In that case, after the termination of the broker's authority, the principal sold to the person with whom the broker had negotiated at a less price; and it was held that he had a right to do so, unless his action was a mere device to escape the payment of commissions. Any other rule would prolong a contract with a broker indefinitely. No man could know when he was freed from its obligations, and a liability would be imposed not contained in the terms of the contract, and essentially perverting its legitimate construction.

We may now apply these principles to the facts of the present case. The plaintiff began his efforts to sell the steel rails of the Bethlehem Iron Company very soon after authority was given him. In the latter part of December, 1873, he went to Canada, and proposed to Mr. Brydges, who was managing director of the Grand Trunk Railway, to sell him the steel rails of the defendant's manufacture. Brydges declined the proposition, saying he was not then in the market, but when he was, would let the plaintiff know. On the 5th of January, the defendant having reduced its price and fixed it at $108 per ton, plaintiff wrote to Brydges telling him of the reduction and that the defendant offered to sell at $108 currency. At the close of his letter the broker adds, "I think a firm cash offer of $105 to $107 currency would be accepted by the Bethlehem Iron Company."

This suggestion is severely criticised by the appellant's counsel and with some apparent reason. The broker was bound to maintain a steady fidelity to the interests of his principal. He had no right to sacrifice the interest of the latter for the benefit of the buyer, and yet it may well be that buyer and seller could only be brought to the consent of a bargain by some moderate concession as to price, and that the broker acted fairly, in view of his talk with Hunt about a reduction, in making the suggestion which is assailed as a violation of duty. On the 9th of January plaintiff again wrote Brydges that defendant was anxious for an order, and inclined to accept a reduction. On February 5th the broker again wrote substantially the same thing. Between the 20th of that month and the 8th of March he was in Montreal having other business for other parties and accomplished nothing. On the 7th of April he received a telegram from Brydges asking the price of one thousand tons of steel rails, "either of English or American manufacture," for immediate delivery. This seemed a hopeful inquiry. Plaintiff after getting the price from Evans, telegraphed an offer for the defendant at $106 currency. At the same time the plaintiff wrote Brydges, repeating the offer but also transmitting offers by other parties of English rails. What that meant, and what its effect on defendant's interests was, is made plain by the further fact that no order came for the defendant's rails, but Sibbald bought for the Grand Trunk, on the 11th of April, five hundred and twenty tons, and on the 14th of April eighty tons of English rails. Meanwhile, on the 11th of April, he caused to be sent to the Grand Trunk Railway a broken piece of

defendant's rail to show the quality of the steel. On the 21st of April he wrote to Hannaford, the chief engineer of the Grand Trunk, explaining the object of sending the fractured rail, and that the defendant would roll to that company's section, and if required, punch or bore holes round in rails.

On or about the 23d of April, 1874, plaintiff received a telegram from the Grand Trunk railway, asking upon what terms one thousand tons of steel rails of the Bethlehem Iron Company would be delivered at Portland. On the same day he telegraphed to the defendant to know the lowest price, and stating that the rails inquired about were for the Grand Trunk. Just such an incident had occurred once before, as we have seen, and nothing had come of it. At that time a price had been named but no purchase had resulted. Was it unreasonable if the patience and confidence of the principal became exhausted? Mr. Hunt telegraphed that he would see plaintiff the next day. He did so, and in that interview declined to name a price, or negotiate further through plaintiff. On that same day the latter telegraphed and wrote to the Grand Trunk officers that the Bethlehem Company declined to name a price. This ended the agency, terminated the contract, left each party at entire liberty, if the action of the defendant was within its legal rights and exercised fairly and in good faith.

The efforts of the plaintiff had been thus unsuccessful. He had not made a bargain, he had failed to bring buyer and seller to an agreement, after having had four months of opportunity, and now his authority was terminated without his having earned commissions. Very plainly he had acquired no right to them, and could acquire no right to them from anything which might happen in the future, unless upon the sole and only ground that the defendant terminated the agency in bad faith and as a device to get the benefit of plaintiff's labors without paying for them.

It is difficult to see how that could be maintained, and yet in his charge to the jury, the trial judge called attention to the claim that on this same 23d of April, Evans, who as a broker, made the final sale, and who had learned on the street that the Grand Trunk Railway was in the market for steel rails, wrote that fact to the defendant and began the negotiations which ended in a sale. He did write such a letter to Hunt, but it is plain that the latter did not receive it until the 25th at the earliest, and not until after he had terminated plaintiff's agency. He could not, therefore, have been influenced by it, and the evidence of bad faith had nothing

left on which to rest except the fact of the actual sale to the Grand Trunk Railway on the 13th of May, which sale was made through Evans and his brokerage paid.

Keeping in view this state of facts, we are prepared to consider certain other alleged errors in the final disposition of the case.

The court was asked to direct a verdict for the defendant on the ground that although the plaintiff had first applied to the defendant for the price of the rails, the defendant was entirely at liberty to refuse his services and to make a sale itself, directly or through another broker. The request was refused. We cannot quite say that this was error in view of the possible question of bad faith in terminating the agency. Slender as may have been its foundation there was perhaps enough in the circumstances of the case and the facts of the transaction to make it proper to submit that question to the jury. It was a question peculiarly within their province, and which the court could hardly be justified in withholding from their consideration.

The court was then asked to charge that the defendant, under the circumstances, had the right to refuse to use the services of Mr. Sibbald, if the action was taken in good faith, without any intent to deprive him of his commission. The proposition involved in this request was, as we have already shown, entirely accurate and sound, and should have been so presented to the jury. The trial judge however was unwilling to so charge without adding a material qualification. He said, "I charge that proposition, but I charge it with qualification, that the defendant had no right to refuse to avail itself of those things which the broker had done and then, indirectly—no matter whether in good faith or in bad faith—by other channels, avail itself of the efforts of the broker with whom it has declined to continue the negotiations." There was an exception both to the refusal to charge and to the qualification added.

It is apparent that the request and the charge, taken together, plainly instructed the jury two things; first, that a seller cannot, even in good faith, terminate the authority of a broker and effect a sale afterwards through other agencies, and freed from any liability to the broker, if in the making of such after-sale the latter's previous unsuccessful efforts are in fact useful and aid and assist in the final bargain; and second, that the circumstances of the case were such as to justify the inference that in the sale actually made the seller did in fact avail himself of the previous labors of the

broker. This last proposition, without being distinctly asserted, was plainly assumed as the basis upon which the qualification of the request to charge rested and was rendered necessary.

The practical result of the instruction thus given was in hostility to the conclusions we have derived from the authorities. It made immaterial the good faith of the defendant in terminating the authority of the broker, and explicitly denied such right as affecting commissions, if the after-sale was in fact aided and assisted by the plaintiff's previous unsuccessful efforts. The test of the right to recover is changed from the question of the principal's good faith in terminating the agency, to the question whether, notwithstanding that fact, the new and independent sale was helped and benefited by the previous action of the broker. The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk railway, except on condition of paying a commission to the plaintiff. For the one only useful thing which he did was to introduce the Bethlehem rails to the notice of that railway company. There could be no sale thereafter would not be as much due to such original act of the broker as the one in question. It could always be said with equal truth that the iron company was availing itself of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent, because though the agency had ended without commissions earned, a later and independent negotiation was probably easier and more likely to succeed by reason of such previous efforts. The charge had a clear tendency to mislead the jury.

Because the broker originally brought the Bethlehem rails to the notice of the Grand Trunk purchasing officers, and thereafter accomplished nothing more than to lessen the principal's price and sell the rails of its rivals to the proposed customer, he is held entitled to recover commissions on a sale made without his intervention and after his agency had been fairly and lawfully terminated. Grant that what he did may justly be said to have aided in the making of the after-sale, yet that does not furnish ground for recovery, as we have already seen. If it did, such an agency might pass utterly beyond the principal's control. The trial judge, in the earlier part of this charge, had stated the general rule correctly, and as we hold it should be. He said to the jury, "If you find from the evidence in any given case, that the broker has

failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other resources for the purpose of effectuating that trade." If the charge had stopped here no error would have been committed. But it did not stop here. At its very close, and as the last words left with the jury, the doctrine, before correctly announced, is qualified by the introduction of a new and wrong element which could scarcely fail to lead the jury astray. It not only denied that unearned commissions were finally cut off by a termination of the broker's authority exercised in good faith, but confusing the essentially different ideas of an endeavor to make some sale, and negotiations about a particular sale, assumed that the last existed when the authority terminated, and on that unwarranted assumption asserted the right to commissions on the sale actually made. He should have submitted the question of good faith in terminating the agency to the jury, and told them if they found that fact, that no commissions could accrue on the after-sale, however much in making it the seller availed himself of the previous labors of the broker.

If, after the broker has been allowed a reasonable time, within which to produce a buyer and effect a sale, he has failed to to so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts. If the charge was intended to mean this, and no more than this, the language chosen was unfortunate, for its direct tendency was to covey to the jury an entirely different idea and one with which we do not concur. For this error the judgment should be reversed.

Judgment reversed; new trial granted, costs to abide the event.

Judgment reversed.

All concur, except RAPALLO, J., absent.

NOTE.—See, also, *Cassady vs. Seeley*, 69 Iowa 509; *Fisk vs. Henarie*, 13 Oreg. 156; *Stewart vs. Mather*, 32 Wis. 344; *Desmond vs. Stebbins*, 140 Mass. 339; *Veazie vs. Parker*, 72 Me. 443; *Sussdorff vs. Schmidt*, 55 N. Y. 319; *Attrill vs. Patterson*, 58 Md. 226; *Conkling vs. Krakauer*, 70 Tex. 735; *Armstrong vs. Lowe*, 76 Cal. 616; *Fischer vs. Bell*, 91 Ind. 243; *Goss vs. Stevens*, 32 Minn. 472; *Neilson vs. Lee*, 60 Cal. 555; *Potvin vs. Curran*, 13 Neb. 302; *Hamlin vs. Schulte*, 34 Minn. 534.

(41 KANSAS, 496.)

DURKEE vs. GUNN.

(Supreme Court of Kansas, January, 1889.)

Durkee and Stout on the 1st of June, 1886, entered into a written contract with Gunn & Marr, by which the latter were given the exclusive sale of certain real estate belonging to Durkee & Stout. Gunn & Marr were to plat, advertise and push the sale at their own expense and were to have for their commission one half of the profits above $300 per acre. The contract was to continue until October 1, 1887. Gunn & Marr caused the ground to be platted, advertised it and entered upon the sale of the land. On July 23, 1886, Marr sold out his interest in the business of Gunn & Marr, including his interest in the contract, to Gunn, and the latter continued to advertise and push the sale alone, to the knowledge of Durkee & Stout, who knew of their dissolution, and without objection. Early in February, 1887, Gunn reported the sale of two lots to Durkee & Stout, when they notified him that he was no longer their agent and repudiated his authority. At that time, the land would have sold for $750 per acre. The court below found Gunn entitled to recover for the breach of the contract and assessed his damages at his share of the profits at that price. Defendants allege error.

J. D. McCleverty, for plaintiffs in error.

Ware, Biddle & Cory, for defendant in error.

HORTON, C. J. I. It is claimed by Messrs. Durkee & Stout, who entered into a contract with Messrs. Gunn & Marr on June 1, 1886, that the dissolution of the firm of Gunn & Marr terminated their agency; that Marr, the retiring member of the firm, had no authority to sell or transfer his interest or the interest of the firm in the contract of June 1, 1886, to Gunn; therefore, that as no new contract was made in writing by Gunn, he could not recover as agent or otherwise for any damages or services subsequent to July 23, 1886, the date of the dissolution. Against this it was urged that Gunn, from the findings of the trial court, as continuing partner, succeeded by the terms of his agreement with Marr to all the rights of the firm, if Messrs. Durkee & Stout recognized or approved of his agency after the dissolution of the firm. It is held by

number of cases that an assignment by one partner of all his interest in the partnership is *ipso facto* a dissolution of the partnership, though the assignment is made to another partner. *Marquand vs. Mfg. Co.*, 17 Johns. (N. Y.) 525; *Edens vs. Williams*, 36 Ill. 252; *Rogers vs. Nichols*, 20 Tex. 719. But in *Taft vs. Buffum*, 14 Pick., (Mass.) 322, it is held that an assignment by one partner to another of his interest in the partnership property is not *ipso facto* a dissolution of the partnership. Whether it so operated depended on its terms as to the intention of the parties. See also *Monroe vs. Hamilton*, 60 Ala. 226; *Buford vs. Neely*, 2 Dev. Eq. 481.

The findings of the trial court, however, show that the assignment from Marr to Gunn was recognized by Durkee & Stout after it was made. Marr does not claim any interest in the contract, either for himself or for the old firm of Gunn & Marr. After the dissolution on July 23, 1886, Gunn continued to act under the contract of June 1, with the knowledge and without the objection of Durkee & Stout. * * *

In our opinion, on account of the conduct and acts of all the parties, the rights, duties and liabilities of W. C. Gunn were the same after dissolution as before, excepting that the contract of June 1, 1886, was to be fully carried out on the part of Gunn & Marr by Gunn only. Therefore, the point made that the contract of June 1, was in its nature personal only, and hence not assignable, need not under the findings be discussed. * * *

II. As neither Messrs. Gunn & Marr nor the continuing member of the firm, W. C. Gunn, had any interest in the land described in the contract, but only shared in the surplus or profits, the agency of Gunn was revocable. *Hawley vs. Smith*, 45 Ind. 183. But, although Messrs. Durkee & Stout had the power to annul the contract and refuse to permit Gunn to act, yet when they so refused, without any just reason or excuse, after having recognized Gunn as the continuing member of the firm, they were liable to him for all damages resulting proximately from the breach of the contract.

III. The court allowed Gunn as his measure of damages one-half of what the land would have sold for at the commencement of his action above the price Messrs. Durkee & Stout agreed to accept for the land, as stated in the contract. It is contended that the rule followed was erroneous. * * *

We think that Gunn, owing to the wrongful revocation of his agency by Messrs. Durkee & Stout in the early part of February, 1887, was entitled to recover such compensation or damages as

would be equal in amount to his share of the profits which would have resulted had the lands been sold by him. *Hawley vs. Smith, supra.* This is what he really recovered. Therefore no erroneous rule was followed, nor are the damages allowed excessive. Messrs. Durkee & Stout cannot take advantage of their own wrongful acts, and as Gunn was prevented by them from performing a contract, his remedy is the same as if he had performed.

We perceive no error in the record, and therefore the judgment of the district court will be affirmed.

(42 MINNESOTA, 526.)

ALWORTH vs. SEYMOUR.

(Supreme Court of Minnesota. February, 1890.)

Appeal by defendant from an order overruling her demurrer to plaintiff's complaint, which alleged the following facts. Defendant, who was a widow residing in Canada, had an interest in lands left by her husband in Minnesota, but the location, value and amount of these lands were unknown to her. Plaintiff was an abstracter of titles, and made an agreement with defendant to look up and recover her interests in these lands, by suit if necessary, at his own expense if unsuccessful, but if successful, for half of the proceeds after deducting the expenses. After doing work worth $100, and becoming liable to attorneys for services to the amount of $100, the defendant repudiated the agreement. Defendant's interest was worth $25,000. The complaint prayed specific performance of the agreement; that defendant be enjoined from conveying any of the lands until plaintiff's expenses had been paid and one-half of the land conveyed to him and that his disbursements and expenses be declared a lien.

True & Wetherby, for appellant.

Draper & Davis, for respondent.

MITCHELL, J. The complaint in this action was evidently framed with reference to compelling specific performance of the contract declared on. The point urged by defendant in support of her demurrer is that the contract is champertous.

I. It is not necessary to determine here whether or not the com-

mon law as to champerty is in force in this state, because there are at least two reasons why plaintiff cannot have specific performance in this case: (1) The contract did not create a power "coupled with an interest," but a mere naked agency, by which the defendant employed plaintiff as her agent to perform certain services, as compensation for which he was to receive a share of the results of the execution of the agency. It is not enough to constitute a "power coupled with an interest" that plaintiff was to have an interest in the proceeds arising from the execution of the agency. There must be an interest in the thing itself which is the subject of the power, and not merely in that which is produced by the exercise of the power. A power "coupled with an interest" is one engrafted on an estate, or on the thing itself; and the power and the estate must be united and co-exist. This could not be under this contract, for by its terms the plaintiff was only to have an interest in the property recovered through the execution of the agency.

It being, therefore, a case of a mere agency or naked power, the defendant had the *power* (as distinguished from the *right*) to revoke it at any time. Of course if she revoked it without right, plaintiff would have his action for damages for breach of the contract, if a valid one. Mechem, Ag. §§ 207–209; *Hunt vs. Rousmanier*, 8 Wheat. 174 *post* p. 322; *Gilbert vs. Holmes*, 64 Ill. 548; *Hartley's Appeal*, 53 Pa. St. 212; 91 Am. Dec. 207; *Barr vs. Schroeder*, 32 Cal. 609. (2) But, even assuming, that the contract created a "power coupled with an interest," still the court would not decree specific performance, because, from the very nature of the contract, it could not enforce complete performance by both parties. In other words there is no mutuality of remedy. It calls for the personal services of the plaintiff as agent for the defendant. These services are as yet mainly unperformed. The court has no power by its decree to compel him to perform them, much less to direct how he shall perform them; and specific performance will not be decreed unless the court can at the time enforce the contract on both sides so that the whole agreement will be carried into effect according to its terms. If this cannot be judicially secured on both sides it ought not to be compelled on one side, and the other party left at liberty to perform or not, or to perform in such a way as suits his own interests. Fry, Spec. Perf. § 440; Pom. Eq. Jur. § 1405, and notes; Pom. Spec. Perf. §§ 165, 166.

II. But, although the complaint does not state a case entitling

plaintiff to the relief asked for, viz., specific performance, yet the demurrer was properly overruled, because it states facts entitling him to judgment for $200, the value and amount of his services and disbursements rendered and made or incurred in the execution of his agency. It is well settled by the decisions of this court, that if a complaint states facts constituting a cause of action entitling the party to any relief, either legal or equitable, it is not demurrable because it asks for the wrong relief. *Canty vs. Latterner*, 31 Minn. 239; *Leuthold vs. Young*, 32 Minn. 122. There was nothing illegal in the character of the services contracted for. If there was anything unlawful, it was in the provision as to compensation. But, admitting that the contract was void, as champertous, it does not follow that plaintiff thereby forfeits his right to compensation for the services he has performed, and the disbursments he has made, for the defendant as her agent. *Stearns vs. Felker*, 28 Wis. 594; *Thurston vs. Percival*, 1 Pick. 4. 15; *Rust vs. Larue*, 4 Litt. (Ky.) 411, 14 Am. Dec. 172; *Walsh vs. Shumway*, 65 Ill. 471.

Order affirmed.

NOTE.—Courts will not grant specific performance of contracts for the rendition of personal services involving the exercise of special skill, judgment and discretion, continuous in their nature and running through an indefinite period of time. *Iron Age Publishing Co. vs. Western Union Telegraph Co.*, (1887) 83 Ala. 498, 3 Am. St. Rep. 758. "Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance; 2 Kent's Com. 258, note C; *Hamblin vs. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Sanquirico vs. Benedetti*, 1 Barb. (N. Y.) 315; *Haight vs. Badgeley*, 15 Barb. (N. Y.) 499; *De Rivafinoli vs. Corsetti*, 4 Paige (N. Y.) 264, 25 Am. Dec. 532." Per Andrews, C. J., in *The William Rogers Mfg. Co. vs. Rogers* (1890) 58 Conn. 356, 18 Am. St. Rep. 278. See, also, *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213 and note. See, also, following case and note.

(18 OREGON, 221, 17 AM. ST. REP. 726.)

CORT vs. LASSARD.

(Supreme Court of Oregon, December, 1889.)

Action for injunction to prevent violation of a contract to render personal services. Refused. Plaintiff appeals.

Sears & Beach, for the appellant.

C. H. Hewitt, for the respondents.

LORD, J. This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants were to perform as acrobats exclusively for the plaintiff during a period of six weeks, at a salary of sixty dollars per week, etc.; that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc., that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc.

The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of a unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: 1. That it is immaterial whether the performance is unique, or involves special knowledge or skill; and 2. That the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case there is no negative clause in the contract; but the suit, as decided

by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve personal skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. *Kemble vs. Kean*, 6 Sim. 333. But this case was expressly overruled in *Lumley vs. Wagner*, 1 De Gex, M. & G. 604, upon a like contract for personal services, to sing during a certain period of time, at a particular theater, and not to sing elsewhere without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract.

In delivering this opinion, among other things, the lord chancellor said: "The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended

that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she had actually entered."

In *Montague vs. Flockton*, L. R. 16 Eq. 189, it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere.

Referring to *Lumley vs. Wagner*, 1 De G. M. & G. 604, the vice-chancellor said: "It happened that the contract did contain a negative stipulation, and finding it there, Lord ST. LEONARD relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and granted the injunction on the grounds that Mdlle. Wagner, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point."

As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until *Daly vs. Smith*, 49 How. Pr. 150, was decided, the doctrine of *Lumley vs. Wagner*, 1 De Gex, M. & G. 604 was either entirely rejected or only partially accepted; *Sanquirico vs. Benedetti*, 1 Barb. 315; *Hamblin vs. Dinneford*, 2 Edw. Ch. 528; *Fredricks vs. Mayer*, 13 How. Pr. 566; *Butler vs. Galletti*, 21 How. Pr. 465; *Burton vs. Marshall*, 4 Gill, 487; *Hayes vs. Willio*, 11 Abb. Pr. N. S., 167.

In that case (*Daly vs. Smith*. 49 How. Pr. 150), the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours

with *Lumley vs. Wagner*, 1 De Gex, M. & G. 604. See, also, *Hahn vs. Concordia Society*, 42 Md. 465; *McCaull vs. Braham*, 16 Fed. Rep. 37. In *Fredericks vs. Mayer*, 13 How. Pr. 567, and *Butler vs. Galletti*, 21 How. Pr. 466, the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, whose performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained: for the fact is that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar, and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places, or in obtaining from others the same service, as would happen with actors whose merits were largely intellectual, showing the same reason to exist as much in the one case as in the other for the application of the preventive remedy by injunction.

Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in *Daly vs. Smith*, 49 How. Pr. 150, upon which relief was granted, although the opinion is broad enough to include contracts without such stipulation, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contracts contain no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as

if it was expressed. So that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce specific performance of the whole contract, yet it will exert its preventive power to restrain its breach.

While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is, that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages. "Where," says Prof. Pomeroy, "a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a perty having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." Pomeroy's Eq. Jur., sec. 1343. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market, as in case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them the same or like services could not be easily procured, or be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense. But the present case is far from being one of such character as falls under the principle of

the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique or of any special merit. The plaintiff himself will not even admit that they are; while others say that the performances were "great," "pretty good," "do a fair act," etc., and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

NOTE.—Where a person has entered into a definite contract to perform services of such a personal and unique kind that they cannot be easily replaced, and the loss of them cannot adequately be compensated by damages, while the court will not undertake to enforce specific performance of the contract (see *Alworth vs. Seymour*, *ante*) it will by injunction restrain the person from violating the contract, even though no negative clause is included in the contract. See, in addition to the cases cited in the opinion: *Duff vs. Russell* (1892), 14 N. Y. S. 134; *Metropolitan Exhib. Co. vs. Ward* (1890) 3 N. Y. S. 779: *Pratt vs. Montegriffo* (1890), 10 N. Y. S. 903.

III.

BY OPERATION OF LAW.

(8 WHEATON, 174.)

HUNT vs. ROUSMANIER.

(Supreme Court of the United States, February, 1823.)

Appeal from the circuit court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated that Louis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of one thousand four hundred and fifty dollars, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea,

as collateral security for the repayment of the money. The sum requested was lent; and, on the 11th of January, the said Rousmanier executed two notes for the amount; and, on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and, in the event of the said vessel or her freight being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting that the power was given for the collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all the expenses, out of the proceeds of the property, and to return the residue to the said Rousmanier.

The bill farther stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of seven hundred dollars, taking his note for payment, and a similar power to dispose of his interest in the schooner Industry, then at sea.

The bill then charged, that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only two hundred dollars on the said notes. The plaintiff gave notice of his claim, and, on the return of the Nereus and Industry, took possession of them, and offered the interest in them for sale. The defendants forbade the sale, and this bill was brought to compel them to join in it.

The defendants demurred generally, and the court sustained the demurrer, but gave the plaintiff leave to amend his bill.

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were accordingly executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff.

To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained, and the bill dismissed. From the decree, the plaintiff appealed to this court.

Mr. Wheaton, for the appellant.

Mr. Hunter, for the defendants.

Mr. Chief Justice MARSHALL delivered the opinion of the court.

The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends:

1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry.

2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider, 1. The effect of the power of attorney.

This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modifications. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law; 2 Esp. N. P. Rep. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (sec. 66), by Lord COKE, in his commentary on that section (52*b*.), and in Willes' Reports (105 note and 565). The legal reason of the rule is a plain one. It seems founded on the presumption that the substitute acts by

virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in *Combe's case,* 9 Co. 76b. In that case it was resolved that "when any has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make and execute, a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.

As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

The words themselves would seem to import this meaning. "A

power coupled with an interest," is a power which accompanies, or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest" thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A. to sell for his own benefit, would be a power coupled with an interest; but a power to A. to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A. to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power

to A. to sell for the use of B., inserted in a conveyance to A, of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, and, in the mean time decends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death. * * *

Reversed on other grounds.

NOTE—The death of a partner dissolves the firm and with it terminates agencies in which the firm was principal. Such a termination is *actus Dei*, and the agent cannot recover damages though employed for a term

not yet expired: *Griggs vs. Swift*, 82 Ga. 392, 5 L. R. A. 405. So of the death of a sole principal: *Yerrington vs. Greene*, 7 R. I. 589, 84 Am. Dec. 578. See, also, *Tasker vs. Shepherd*, 6 H. & N. 575; *Fereira vs. Sayres*, 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496.

(10 PAIGE, CH. 205, 40 AM. DEC. 241.)

KNAPP vs. ALVORD.

(New York Court of Chancery, April, 1843.)

Exceptions to master's report, stating the account of the defendant as administratrix of Alvord, deceased, filed by certain creditors of the estate. The estate was insufficient to pay all the debts, and the master allowed the administratix, for a certain sum, retained by one Meads out of the proceeds of the property of the estate sold by him, to cover two notes on which he was indorser for the deceased. It appeared that the deceased, who was a cabinetmaker, wishing to go abroad for his health, gave Meads, who was his indorser on his note to one Rector, the general management of his business, and entire possession and control of his property, with a written power of attorney, authorizing him to conduct the business, to purchase stock, to hire hands, and to collect moneys and apply the same in the business and to the support of the principal's family, etc.; and expressly empowering him to sell and dispose of any or all of the property "at any time or in any manner" which he might deem advisable, and apply the proceeds, in whole or in part, to the payment or security of a certain note indorsed by Whitney and Van Vechten, or any note given in renewal thereof, and to the payment or security of and of his note indorsed by Meads, or for which Meads might become responsible. He also left with him certain notes signed in blank, to be used in renewal of notes. He gave Whitney also a mortgage on the furniture, stock, etc., of his cabinet shop, to secure the note on which he was indorser, but the same was not recorded until after Alvord's death.

Before Alvord's death, Meads renewed the Whitney and Van Vechten note with one of the blanks in his hands, they again indorsing, and also renewed the Rector note, putting his own name as indorser on both notes, and they being protested for non-

payment after Alvord's death, he took them both up. He claimed a lien to reimburse him for the moneys so paid, on the property in his hands, of which he kept possession, and continued to manage the business, with the consent of the administratrix, until 1838, when, with the like assent, he sold the property at auction, and retaining enough to reimburse himself, paid the proceeds to the defendant.

Ira Harris, for the excepting creditors.
S. Stevens and *O. Meads,* for the defendant.

WALWORTH, Chancellor. The personal mortgage to Whitney not being filed till after the death of Alvord, and not being accompanied by an immediate delivery and continued possession of the property it may be doubtful whether it was sufficient to give Whitney, who was liable to Meads as the last indorser of the note of one thousand eight hundred dollars, a preference in payment over the other creditors of Alvord. This case, however, does not turn upon that question; as I am satisfied that an equitable lien upon the property was created by the special clause in the power, in reference to the one thousand eight hundred dollar note, and to notes drawn by Alvord and indorsed by Meads. And as that instrument was accompanied by an actual delivery and continued change of possession of the property, until it was converted into money and applied in payment of the two several notes, it was not necessary that the instrument which created that lien should be recorded, under the act of 1833.

It is the duty of the court to give such a construction to the language of a written instrument as to carry into effect the intention of the parties, so far as that intention can be collected from the whole instrument and the situation of the parties at the time the writing was executed. And I think no one who reads this special clause in connection with the evidence, or rather the admissions, of extrinsic facts which are proper to be taken into consideration, can believe that Alvord did not intend to give the indorsers of the one thousand eight hundred dollar note, and to Meads, as the indorser of the Rector note, and other notes which he might thereafter indorse, a beneficial interest in the execution of this power, for their security and indemnity. It clearly shows that Alvord anticipated that it would probably be necessary for Meads to incur further responsibility, as his indorser, in the discharge of

the duties of his agency, and that something more than an ordinary power of attorney was necessary to protect him from loss. And as the possession of the property was delivered to Meads, in connection with this power to dispose of it for the security and protection of himself and the other indorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived. *Bergen vs. Bennett*, 1 Cai. Cas. in Err., (2 Am. Dec. 281); *Raymond vs. Squire*, 11 Johns. 47. In the case decided by the supreme court of the United States, *Hunt vs. Rousmanier*, 8 Wheat. 174, (*post*, p.322) there was no actual pledge of the property. But a mere power of attorney was executed, authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that Chief Justice MARSHALL held that the power was not coupled with any interest in the vessels. And I presume his opinion on that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt. But even in that case the court protected the rights of Hunt as an equitable mortgagee of the vessels; though the decision was placed on the debatable ground that a party may be relieved in equity against a mistake of law merely.

Being satisfied that Meads had a lien upon the property in his hands, and a right to retain for the amount of these notes, under the special clause in the written power executed by Alvord, it is not necessary to inquire whether he is not also to be considered as the factor of Alvord; so as to entitle him to retain for his advances and liabilities, entirely independent of this special provision in the power of attorney to him. If the arrangement between Alvord and Meads gave to the latter the character of a factor, there can be no doubt as to his lien upon the property in his hands, and his right to retain for all his advances and responsibilities in the business with which he was intrusted by his principal. Although it was doubted, previous to the case of *Kruger vs. Wilcox*, Amb. 252, it is now well settled that a factor has a lien and may retain for a general balance, including responsibilities incurred in the execution of his agency. Whit. on Lien, 103; 2 Kent's Com. 640; Story on Agency, 34, sec. 34. And the case of *Foxcraft vs. Wood*, 4 Russ. 487, was probably decided upon the ground that the arrangement under which the business at Birmingham was carried

on constituted Foxcraft the factor of Lanning, although he received a fixed salary instead of the usual mercantile commissions for his services.

The decision of the master was right in allowing to the administratrix the amount retained by Meads for the two notes. The exceptions are therefore overruled with costs, and the report of the master is confirmed.

(113 NEW YORK, 600.)

WEBER vs. BRIDGMAN.

(New York Court of Appeals, June, 1889.)

Appeal from an order reversing a judgment in favor of the plaintiff.

In 1871, Weber executed to Hartwig a power of attorney, authorizing him, among other things, to collect and receive moneys becoming due from any person to his principal, and to execute discharges thereof, etc. Hartwig purchased a bond and mortgage, receiving an assignment thereof to Weber, and as agent collected the interest thereon as it fell due, receipting therefor in the name of Weber. The latter died in Germany in January, 1874. The bond fell due in May of that year and was paid by Bridgman, the then owner of the mortgaged premises, to Hartwig, who executed a satisfaction of the mortgage and delivered to the payor the bond and mortgage, the assignment and the power of attorney. Hartwig knew at the time of the death of Weber, but he did not disclose the fact to Bridgman, and the latter made no inquiries. In an action brought in 1885 to foreclose the mortgage, the court found that Hartwig never accounted to plaintiff, the widow and administratrix of Weber, for the bond and mortgage or the proceeds, and that plaintiff never assented to or ratified the payment, and did not know of the existence of the bond and mortgage or the cancellation thereof until within a short time of the commencement of the action.

Alex. S. Bacon, for appellant.

Thomas H. Rodman, for respondents.

DANFORTH, J. It should be assumed, without argument, that

the plaintiff is not bound by the act of Hartwig, unless his authority to receive the money and discharge the mortgage was established, or unless she has, with knowledge of the facts, recognized that transaction and adopted it. The respondents' contention is that both alternatives are established, viz.: That the payment to Hartwig was a valid payment, and also that Hartwig accounted with the plaintiff and paid over to her the money so received by him. As Bridgman dealt with Hartwig as an agent, and now seeks to charge the representatives of Weber as if his dealings had been with the principal, the burden of proof was on him to show either that the agency existed, and that the agent with whom he dealt had the authority he assumed to exercise or that the plaintiff is estopped from disputing it. That an agency of some kind did at one time exist in favor of Hartwig was sufficiently manifest by the power of attorney and proof of its due execution and delivery by Weber. If it be conceded that the act in question was within the authority which Hartwig once had, it would not aid the defendant, for that authority was determined by the death of Weber before the act was performed, and although Bridgeman had no notice of his death the act was void and the estate of the principal is not bound.

The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts an end to the agency, and, therefore, is an instantaneous and unqualfied revocation of the authority of the agent. 2 Kent's Com. 646; *Hunt vs. Rousmanier,* 8 Wheat. 174, (*post,* p. 322).

There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where an agency is coupled with an interest *(Knapp vs. Alvord,* 10 Pai. 205, 40 Am. Dec. 241 (*ante,* p. 328; *Hunt vs. Rousmanier, supra; Hess vs. Rau,* 95 N. Y. 359); or where the principal was a firm and only one of its members died. *Bank vs. Vanderhorst,* 32 N. Y. 553. But both cases recognize the general rule to be as above stated. In *Davis vs. Windsor Savings Bank* (46 Vt. 728), the rule was applied. The defendant paid money to the agent after the death of his principal, but in ignorance of it, and the administrator of the deceased recovered. It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held

to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England (Leake on Con. 487), although now modified by statute, and is generally applied in this country. Story on Agency, sec. 488; Pars. on Con. vol. 1, p. 71; 2 Kent's Com. (12th ed.) 645, 646.

In some states alterations have been made by statute; and, following the civil law, it was held in Pennsylvania (*Cassidy vs. M'Kenzie*, 4 Watts & Serg. 282, 39 Am. Dec. 76,) that the act of an attorney, done after the death of his principal, of which he was ignorant, are binding upon the parties. This was, however, in opposition to the current of authority. 1 Pars. on Con. 71; 2 Kent's Com. 646.

But even that case does not aid the defendant, for here the agent knew of the death of his principal. Moreover, the defendant might have known it had he taken the precaution to inquire. He had never before dealt with the agent. The power of attorney was not of recent date, and the defendant should be held to have assumed the burden of showing that Hartwig was, at the moment of the transaction, a person authorized to act so as to bind the real owner of the bond and mortgage, whoever that person might prove to be. There is no equity in his favor, for the loss, if any, is from his own negligence.

It is claimed, however, by the learned counsel for the respondents, that the rule has application only where the act of the agent is required to be done in the name of the principal, and his contention is, as we understand it, that, inasmuch as Hartwig had possession of the bond and mortgage, the defendant from that fact had a right to infer an agency to collect, and so the payment was valid. However that might be under other circumstances, the contention has no force in this instance. The power of Hartwig was not left to inference. Whatever it was it came before the defendant in writing. The power of attorney was in his hands. It authorized such acts only as could be performed in the name of the principal, and so the defendant understood it. He caused the power to be recorded, took a discharge of the mortgage under it executed by Hartwig as agent for Weber, and gave the check payable to the order of Hartwig in that character. Except for the power of attorney and its recital, and the acts of Hartwig under it, the defendant would not have even the shadow of a defense. In his own name Hartwig could do nothing, and of this the defendant had full notice. The power of attorney which accompanied

possession of the securities defined the actual authority, and the defendant had notice of its contents at the same moment that he saw the bond and mortgage in the hands of the attorney. The authority which might be gathered from their mere possession is, under these circumstances, of no force. The giving of an authority in writing imports that the extent of the authority is to be looked for in its terms, and not elsewhere.

But a more difficult question remains, one on which the courts below differed, and in consequence of which difference we have jurisdiction to pass upon it. Code, §§ 1337, 1338. It is a question of fact whether, with knowledge of the circumstances, the plaintiff ratified the payment. * * * (The omitted portion of the opinion discusses the evidence as to knowledge and ratification of payment by plaintiff; the court coming to the conclusion that it failed to show such knowledge or ratification.)

It is true that between the time of payment and the beginning of this suit, many years elapsed, but the fact of payment was unknown to plaintiff. It is also true that she failed, before this action and during all these years, to demand either principal or interest from the defendant, but she was altogether ignorant that the security existed, by means of which either had become due. To show the contrary was the duty of the defendant, if the truth enabled him to do so. The trial judge found that he had failed in this respect, and we have no hesitation in saying that a different finding would not have been justified by the testimony. The conclusion actually reached was the only one permitted by the evidence. The appeal necessarily succeeds. *Sherwood vs. Hauser*, 94 N. Y., 626; *Baird vs. Mayor, etc.*, 96 Id., 567; *Crane vs. Baudouine*, 55 Id., 256; *Westerlo vs. De Witt*, 96 Id., 340.

The order of the general term should, therefore, be reversed, and the judgment of the special term affirmed, with costs.

(38 NEW JERSEY LAW, 536.)

MATTHIESSEN & WEICHERS REFINING COMPANY vs. McMAHON'S ADMR.

(Court of Errors and Appeals of New Jersey, March, 1876.)

Action of trover by the administrator of McMahon to recover from the Refining Company the value of goods alleged to have been sold by McMahon to the company while he was insane. The goods were delivered by one Shindly as agent of McMahon.

R. Gilchrist, for plaintiffs in error.

J. Linn, contra.

DEPUE, J. * * * Notwithstanding the declaration of Chancellor KENT (2 Kent, 645) "that the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition before it could control the operation of the power," the weight of authority, as well as sound reasoning, lead to the conclusion that the after-occurring insanity of the principal operates, *per se,* as a revocation or suspension of the agency, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency, so that the power became coupled with an interest; or where a consideration of value is given by a third person, trusting to an apparent authority in ignorance of the principal's incapacity. Story on Agency, § 481; *Bunce vs. Gallagher,* 5 Blatch. C. C. 481; *Davis vs. Lane,* 10 New Hamp. 156.

Justice STORY states the principle to be that "as the party himself, during his insanity, could not personally do a valid act, his agent cannot, in virtue of a derivative authority, do an act for and in his name which he could not lawfully do for himself." From this principle the conclusion inevitably results, that transactions of third parties, which, under the circumstances, would be invalid if had directly with the principal, must be equally invalid though they be done with the agent. Saving the rights of persons who, before the insanity intervened, became interested in the power by reason of a consideration advanced, or who, in ignorance of the incapacity, in good faith parted with a consideration of value,

relying on the apparent authority of the agent, complete justice will be done, and the law on this subject be made to harmonize. * * *

NOTE.—See, also, *Davis vs. Lane*, 10 N. H. 156; *Drew vs. Nunn*, 4 Q. B. Div. 661, 29 Moak's Eng. Rep. 92; *Hill vs. Day*, 34 N. J. Eq. 150; *Bunce vs. Gallagher*, 5 Blatchf. (U. S. C. C.) 481.

(95 UNITED STATES, 425.)

INSURANCE CO. vs. DAVIS.

(United States Supreme Court, October, 1877.)

This was an action to recover upon a policy of life insurance, issued by a New York company upon the life of a citizen and resident of Virginia. Payments of premiums had been regularly made until the beginning of the war, the last one having been paid December 28, 1860. Before the war the company had an agent, Garland, in Virginia, to whom the premiums were paid; he entered the Confederate service as a major and served through the war. Tender of the premium due in December, 1861, was made to this agent which he refused to receive, as he had received no receipts from the company for that year. A similar tender was also made after the war, with like result. The agent testified that he refused to receive any premiums, had no communication with the company during the war, and after its close did not resume his agency. The insured died in 1867. It was claimed by plaintiff that the failure to pay premiums during the war was due to the fault of the company, as it had not supplied its agent with receipts and rendered it impossible for the insured to pay. Defendant claimed that the war terminated the authority of the agent to receive payment. Verdict for plaintiff below, and defendant brought error.

Matt. H. Carpenter, for plaintiff in error.
Samuel B. Paul, for defendant in error.

BRADLEY, J. (After disposing of a preliminary question.) That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years, that any further discus-

sion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained either personally or by correspondence or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment of debts to an agent of an alien enemy, where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war, though, if so transmitted without the debtor's connivance, he will not be responsible for it. WASHINGTON, J., in *Conn vs. Penn*, Pet. C. Ct. 496; *Buchanan vs. Curry*, 19 Johns (N. Y.) 141.

In the next place, in order to the subsistence of the agency during the war, it must have the assent of the parties thereto,— the principal and the agent. As war suspends all intercourse between them, preventing any instructions, supervision or knowledge of what takes place on the one part, and any report or application for advice on the other, this relation necessarily ceases on the breaking out of hostilities even for the limited purpose before mentioned, unless continued by the mutual assent of the parties. It is not compulsory; nor can it be made so on either side, to subserve the ends of third parties. If the agent continues to act as such, and his so acting is subsequently ratified by the principal, or if the principal's assent is evinced by any other circumstances, then third parties may safely pay money for the use of the principal into the agent's hands; but not otherwise. It is not enough that there was an agency prior to the war. It would be contrary to reason that a man without his consent should continue to be bound by the acts of one whose relations to him have undergone such a fundamental alteration as that produced by a war between the two countries to which they respectively belong; with whom he can have no correspondence, to whom he can communicate no instructions, and over whom he can exercise no control. It would be equally unreasonable that the agent should be compelled to continue in the service of one whom the law of nations declares to be his public enemy. If the agent has property of the principal in his possession or control, good faith and fidelity

to his trust will require him to keep it safely during the war and to restore it faithfully at its close. This is all. * * *

"What particular circumstances will be sufficient to show the consent of one person that another shall act as his agent to receive payment of debts in an enemy's country during war may sometimes be difficult to determine. Emerigon says that if a foreigner is forced to depart from one country in consequence of a declaration of war with his own, he may leave a power of attorney to a friend to collect his debts and even to sue for them. Traite des Assurances, Vol. 1, 567. But though a power of attorney, to collect debts, given under such circumstances, might be valid, it is generally conceded that a power of attorney cannot be given during the existence of war by a citizen of one of the belligerent countries resident therein, to a citizen or resident of the other; for that would be holding intercourse with the enemy which is forbidden. Perhaps it may be assumed that an agent *ante bellum*, who continues to act as such during the war in the receipt of money or property on behalf of his principal where it is the manifest interest of the latter that he should do so, as in the collection of rents and other debts, the assent of the principal will be presumed unless the contrary be shown; but that where it is against his interests, or would impose upon him some new obligation or burden, his assent will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. In some way, however, it must appear that the alleged agent assumed to act as such and that the alleged principal consented to his so acting. * * *

In some recent cases in certain of the State courts of last resort, for whose decisions we always entertain the highest respect, a different view has been taken; but we are unable to concur therein. In our judgment, the unqualified assumption on which those decisions are based—namely, "Once an agent always an agent," or, in other words, that an agency continues to exist notwithstanding the occurrence of war between the countries in which the principal and agent respectively reside—is not correct, and that the continuance of the agency is subject to the qualifications which we have stated above. * * * We do not mean to say that, if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States would not have been valid; nor that a stipulation to continue such author-

ity in case of war, made before its occurrence, would not have been a valid stipulation, nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted that Garland declined to act as agent.

Judgment reversed.

NOTE.—See, also, *New York L. Ins. Co. vs. Statham*, 93 U. S. 24; *Ward vs. Smith*, 7 Wall. (U. S.) 447; *Brown vs. Hiatts*, 15 Id. 177; *Fretz vs. Stover*, 22 Id. 198.

The decisions of the State courts are usually opposed to the principal case though earlier in point of time; *Sands vs. Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535; *Manhattan L. Ins. Co. vs. Warrick*, 20 Gratt, (Va.) 614, 3 Am. Rep. 218; *Robinson vs. Life Assur. Co.*, 42 N. Y. 54, 1 Am. Rep. 490.

BOOK II.

OF THE AUTHORITY CONFERRED; ITS NATURE AND EFFECT.

CHAPTER I.

OF THE NATURE OF THE AUTHORITY.

(9 WALLACE, 766.)

BUTLER vs. MAPLES.

(United States Supreme Court, December, 1869.)

Butler and others, during the late rebellion, were copartners doing business under the firm name of Bridge & Co., at Memphis, Tenn. One Shepherd professed to act as their agent. He had been authorized, by written agreement in 1863, to purchase cotton for them in Desha county, Arkansas, and its vicinity. He was to buy on the best possible terms, paying not more than 30 cents per pound on the average, and it was agreed that he should pay as little as possible on the cotton until it should be delivered on a boat or within the protection of a gunboat. There was also the testimony of one Martin that he had been sent to Arkansas by defendants, Bridge & Co., with money and instructions for Shepherd, the instructions being that he should purchase cotton for the firm, but was not to pay more than from 30 to 35 cents per pound. He might make small advances, but was instructed not to pay the balance of the purchase money, or make it payable, until the firm should be able to send a boat up the Arkansas river for the cotton, and until it was in their possession, weighed and placed on the

boat. He was directed to take no risk for the firm of the destruction of the cotton except to the extent of the money advanced.

While so professing to act as the agent of Bridge & Co., Shepherd purchased 144 bales of cotton from Maples, buying it as it lay, and agreeing to pay 40 cents a pound for it as soon as weighed. Having been weighed, he removed 54 bales of it, but 90 bales were burned before they could be placed on a boat to be carried up the river. The 54 bales went through to Memphis, and Maples went there to see Bridge & Co. He saw one of the firm, who wholly denied Shepherd's authority, refused to pay anything for the cotton lost, but agreed to pay 50 cents a pound for the 54 bales. Maples took this, believing what was told him as to Shepherd's authority. Having learned more regarding this matter, he sued Bridge & Co. for the price of the cotton burned. Verdict for the plaintiff, and defendants removed the case to the Supreme Court.

Mr. Palmer, for plaintiff in error.

P. Phillips and *D. McRae, contra.*

STRONG, J. At the trial, it was, of course, incumbent upon the plaintiff to prove not only the contract of sale, but also that Shepherd, with whom the contract had been made, had authority to act for and bind the defendants. Accordingly, evidence was submitted to show that the cotton was purchased by Shepherd when professing to act as an agent for the defendants. There was hardly any controversy about this fact, and no questions are now raised respecting the competency, or sufficiency of the proof, or the manner in which it was submitted to the jury. But the authority of Shepherd to make the contract for the defendants, and bind them to its performance was stoutly denied, and it is now strenuously insisted that the court erred in the instructions given to the jury respecting the evidence of his agency. The defendants insist the court erred in charging that the written agreement between him and Bridge & Co. constituted him their general agent. We do not find that the court did thus instruct the jury, though it must be admitted the charge may have been thus understood. The jury was instructed that if Shepherd held himself out as the general agent of Bridge & Co., the defendants were bound by the contract he made with the plaintiff for the cotton, though in making the contract he transgressed the instructions he had received, and secret limitations of his authority, which instructions and limitations were not revealed to the plaint-

iff. It is true, as has been noticed, there was other evidence of a general agency beyond that which the agreement furnished, but as it was parol evidence, its force and effect were for the jury, and hence the court could not rightly have charged that the defendants were bound by the contract unless the agreement did itself constitute Shepherd a general agent.

But did it not? The distinction between a general and a special agency, is in most cases a plain one. The purpose of the latter is a single transaction or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency, but authority to make purchases from any persons with whom the agent may choose to deal, or to make an indefinite number of purchases, is a general agency. And it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only. Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise.

Looking to the agreement between Bridge & Co. and Shepherd, it cannot be doubted that it created a general agency. It was a delegation of authority, to buy cotton in Desha county and its vicinity, to buy, generally, from whomsoever the agent, not his principals, might determine. It had in view not merely a single transaction, or a number of specified transactions, which were in the minds of the principals when the agent was appointed, but a class of purchases, a department of business. It is true that it contained guards and restrictions which were intended as regulations between the parties, but they were secret instructions rather than limitations. They were not intended to be communicated to the parties with whom the agent should deal, and they never were

communicated. It was, therefore, not error to instruct the jury as the court did, that the agency was a general one, and that the defendants were bound by the contract, if Shepherd held himself out as authorized to buy cotton, and if the plaintiff had no knowledge of the instructions respecting the mode in which the agent was required to act.

It may be remarked here, that the reasons urged by the plaintiffs in error, in support of their denial of liability for the engagements made by Shepherd, are, that he agreed to pay forty cents per pound for the plaintiff's cotton, that he bought the cotton where it lay instead of requiring delivery on board a steamboat, or within the protection of a gunboat; and that he did not obtain a permit from the government to make the purchase.

The argument is that in the first two particulars he transcended his powers, and that his authority to buy at all was conditioned upon his obtaining a permit from the government. All this, however, is immaterial, if it was within the scope of his authority that he acted. The mode of buying, the price agreed to be paid, and the antecedent qualifications required of him, were matters between him and his principals. They are not matters in regard to which one dealing with him was bound to inquire. But even as between Bridge & Co. and Shepherd a purchase at forty cents per pound was not beyond his authority. He was authorized to buy "on the best possible terms, not paying an *average* of more than thirty cents per pound." This contemplated his agreeing to pay in some cases above thirty cents. The average was regulated, but no maximum was fixed. Nor is there anything in the agreement that forbade his purchasing cotton deliverable at once where it lay, though not on a boat or in the protection of a gun-boat. He was authorized to purchase deliverable at such times and places of shipment as might be agreed upon; that is, deliverable when and where it might be stipulated between him and the seller. True, he was to pay as little as possible until the cotton was delivered on a boat, or within the protection of gun-boat; and when thus delivered, the property in the goods was to vest in the principals, excepting his share of the profits, but he was not prohibited from paying the whole price, or agreeing to pay the whole price, if insisted on by the vendor. The stipulation respecting the vesting of ownership was nothing more than a definition of right between him and his principals, as is manifested by the exception. Nor was Shepherd bound to procure a permit in his own name. He

might have been, had it been necessary, but if under the permit granted by Bridge & Co. he could purchase as their agent, it was all the agreement required.

It is further objected to the charge given to the jury respecting general and special agency, that it was not applicable to the proof in the case, and was therefore irrelevant and calculated to mislead the jury, and, because, as stating abstract questions of law, the instruction was erroneous. If, in truth, it was irrelevant, it was not on that account necessarily erroneous and calculated to mislead the jury. We are not shown, nor do we perceive, how the jury could have been misled by it. They were instructed that, in cases of special agency, one who deals with the agent must inquire into the extent of his authority, but that a principal is bound by all that his general agent has done within the scope of the business in which he was employed, and this, though the agent may have violated special or secret instructions given him, but not disclosed to the party with whom the agent deals. Surely this was correct, and it was applicable to the evidence in the case. It has been intimated during the argument that the court should have added that no such liability can exist to one dealing with an agent with notice that the particular act of the agent was without authority from the principal. To this several answers may be made. The exception to the general rule, which it is said the court below should have recognized, is implied in what the court did say. Again, there was no request for any such instruction, and still again, the evidence in the case did not demand it.

There was no pretense that the plaintiff had any notice of secret instructions given to Shepherd, or of any limitations upon his authority. Nor was there anything that imposed upon him the duty of making inquiry for secret instructions or for restrictions. There were no circumstances that should have awakened suspicion. The plaintiff was not apprised that the authority was in writing. The argument is very far-fetched that infers a duty to inquire whether the agent had private instruction from the fact that the contract was made in a region that had been in a state of insurrection. * * * Judgment affirmed.

NOTE.—See, also, *Munn vs. Commisson Co.*, 15 Johns. (N. Y.) 48, 8 Am. Dec. 219; *Rossiter vs. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Commercial Bank vs. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Odiorne vs. Maxcy*, 13 Mass. 178; *Williams vs. Getty*, 31 Penn. St. 461, 72 Am. Dec. 757; *Lister vs. Allen*, 31 Md. 543, 100 Am. Dec. 78.

(10 NEW HAMPSHIRE, 538.)

HATCH vs. TAYLOR.

(Superior Court of Judicature of New Hampshire, July, 1840.)

Trespass for taking a horse of the plaintiff's. It appeared on the trial that defendant was the owner of two horses, and let them to one Clark for the purpose of drawing a load from Lowell, Mass., to Thornton, N. H. While Clark had the horses in Thornton, he exchanged one of them with the plaintiff for a mare and colt; the plaintiff supposing that the horses belonged to Clark. The mare died while Clark was on his return to Lowell. The other horse and the colt were returned to defendant, but defendant refused to sanction the trade, and told Clark to take the colt away. Clark soon after sold the colt to one Emerson, who knew of the trade. Defendant knew of this sale and made no objection, but furnished Emerson the money to buy the colt. Emerson traded the colt for a mare with one Spofford, defendant furnishing Emerson the money to pay the difference. Emerson then sold this mare to defendant. Defendant then went to plaintiff and took away the horse which Clark had traded to him, denying Clark's authority to make the trade.

There was some evidence on the part of plaintiff tending to show that Clark, when he left Lowell, was authorized by defendant to sell or exchange this horse. This defendant denied, and alleged that if Clark had any authority, it was a permission to sell both horses if he could get a good price, but not to sell either alone, and that any such authority to sell would not authorize an exchange. Plaintiff contended that defendant's subsequent dealings in reference to the colt amounted to a ratification. Verdict for the plaintiff and defendant moved for a new trial.

Bell & Quincy, for defendant, contended that Clark's authority was special—to sell both or neither—and hence that defendant was not bound.

Bartlett & Rogers, for plaintiff, contended that the instructions to Clark did not limit his authority, and also that defendant had ratified the exchange.

PARKER, C. J. It cannot be known, from the case before us, whether the jury found that Clark did not exceed his authority

in making the exchange, or whether the verdict was based upon a ratification of the transaction, by the acts of the defendant afterwards. If, therefore, the instructions to the jury were not substantially correct upon either of these points, there must be a new trial.

There was sufficient evidence to warrant a finding that Clark, when he received the horses from the defendant, had an authority, of some description, given him respecting a sale or exchange of one or both of them. What this authority was, whether to sell or exchange, and what were the limitations upon it, or the instructions of the defendant relative to the manner of its execution, did not very clearly appear; the authority itself having been conferred verbally, and the evidence establishing its existence, and what was said about it, being derived mainly from the subsequent, and in some instances contradictory, declarations of the defendant himself.

The instructions to the jury take a distinction between the authority given to an agent, which he is not only bound to pursue, in duty to his principal, but a deviation from which will render his act void (unless he has been held out, or enabled to hold himself out, as having a different authority), and the instructions or directions which he may receive from his principal, relative to the manner in which he is to execute his authority, which are matters between the principal and agent, so that a disregard of them, by the latter, although it may make him liable to the principal, will not vitiate the act, if it be done within the scope of the authority itself.

It is very apparent that such a distinction must exist in some cases of agency, the particular instructions from the principal, relative to the circumstances under which the agent is to act, being intended as directions for his guidance, but not operating as limitations upon the authority which is conferred. Thus, in case of a general agent, authorized to transact all business of a particular kind, although he can bind his employer only by acts within the scope of his authority, yet that authority is distinct from private orders or instructions relative to the mode in which it is to be executed, and the latter cannot limit or impair the authority, or affect the rights of a party dealing with the agent, unless he had knowledge of such private instructions. The books so uniformly concur in establishing this principle, that it is unnecessary to cite authorities in support of it. Strangers cannot look at the private

communications that may pass between a principal and his agent. 15 East, 43, 408; 5 Bing. 442 (E. C. L. R. 500).

But whatever was the extent of Clark's authority in the present case, he was not a general, but a special agent, authorized to make a sale, or exchange, of one or two horses only; and the question arises, how far the same rule is applicable to agencies of that character.

To a very considerable extent, the principles applicable to general agencies apply also to those of a special and limited character. Thus, the general principle that the acts of the agent, within the scope of his authority, bind his employer; and that his acts beyond that point are void unless the principal has held him out, or enabled him to hold himself out, as having more enlarged powers than he actually possessed, or unless the employer ratifies his acts, is applicable to all classes of agencies.

It is contended, however, that the distinction between authority and instructions does not apply in cases of special agents, and the defendant's counsel rely particularly upon a treatise on agency, recently published, which, it must be admitted, in some measure sustains their position.

Speaking of the nature and extent of the authority of agents, the author refers to "The distinction commonly taken between the case of a general agent, and that of a special agent; the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object;" and says: "In the former case the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions, which are given to him by the principal, limiting, qualifying, suspending or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds his special and limited authority conferred on him, the principal is not bound by his acts; but they become mere nullities, so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority." Story on Agency, 115. The phraseology of his last clause is similar in substance to that of other elementary writers. 2 Kent's Com., Lecture 41; 1 Livermore on Agency 108.

Taken strictly, as it stands, there can be no doubt of the correctness of the rule. If a special agent exceeds his special and limited authority, without doubt the principal is not bound by his acts, unless he has held him out, or enabled him to hold himself out as

possessing a more enlarged authority. But from its connection with the preceding clause, and from its general connection with the context, this clause is understood as asserting that if a special agent exceeds the special and limited private instructions or directions which are given him by the principal, limiting or qualifying suspending or prohibiting the exercise of his agency, under particular circumstances, the principal will not be bound, unless he has held the agent out as possessing a more enlarged authority than the right to act, coupled with the instructions, would give him. In other words, that instructions or directions to a special agent, notwithstanding they are private or secret, if intended to operate upon, and limit, qualify, suspend or prohibit the action of the agent under certain circumstances, become part and parcel, and of the essence of the authority itself, so that the agent will not be acting within the scope of his authority, or apparent authority, if he disregard them. So it seems to be understood by the defendant's counsel, and upon a subsequent page it is stated, that if a common person, not a factor, should be employed to make a sale, "and he should violate his private instructions, and deviate from his authority in the sale, the principal would not be bound." Story on Agency, 122.

If this is so, there can be, ordinarily, no such thing as instructions, contra-distinguished from authority, in the case of a special agent; as, whatever directions he receives respecting the mode and manner in which he is to perform his duties, will partake of the nature of authority, or qualification of authority, and limit or suspend his right to act, and to bind the principal unless there has been some holding out of the agent as having an authority beyond the import of such directions.

But it is, we think, apparent enough, that all which may be said to a special agent about the mode in which his agency is to be executed, even if said at the time that the authority is conferred, or the agency constituted, cannot be regarded as part of the authority itself, or as a qualification or limitation upon it. There may be, at all times, upon the constitution of a special agency, and there often is, not only an authority given to the agent, in virtue of which he is to do the act proposed, but also certain communications, addressed to the private ear of the agent, although they relate to the manner in which the authority is to be executed, and are intended as a guide to direct its execution.

These communications may, to a certain extent, be intended to

limit the action of the agent; that is, the principal intends and expects that they shall be regarded and adhered to in the execution of the agency; and should the agent depart from them he would violate the instructions given him by the principal, at the time when he was constituted agent, and execute the act he was expected to perform in a case in which the principal did not intend that it should be done. And yet, in such case he may have acted entirely within the scope of the authority given him, and the principal be bound by his acts. This could not be so, if those communications were limitations upon the authority of the agent. It is only because they are not to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is valid, although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent. Thus, where one person employs another to sell a horse, and instructs him to sell him for $100 if no more can be obtained, but to get the best price he can, and not to sell him for less than that sum, and not to state how low he is authorized to sell, because that will prevent him from obtaining more. Such a private instruction can with no propriety be deemed a limitation upon his authority to sell, because it is a secret matter between the principal and agent which any person proposing to purchase is not to know, at least until the bargain is completed. And if no special injunction of secrecy was made, the result would be the same, for, from the nature of the case, such an instruction, so far as it regards the *minimum* price, must be intended as a private matter between the principal and agent, not to be communicated to the persons to whom he proposed to make a sale from its obvious tendency to defeat the attempt to obtain a greater sum, which was the special duty of the agent. It will not do to say that the agent was not authorized to sell, unless he could obtain that price. That is the very question, whether such a private instruction limits the authority to sell.

It seems very clear that anyone who proposes to deal with a special agent has the right, in the first place, to know what authority he possesses, and all the limitations upon it. He deals with him at his peril, because he is bound to enquire into the nature and extent of the authority conferred. *Snow vs. Perry*, 9 Pick. R. 542; *Schimmelpennick vs. Bayard*, 1 Peter's S. C. R. 264; Story on Agency, 124.

The principal is not to be bound by the acts of the special agent

beyond what he has authorized, because he has not misled the confidence of the party dealing with him, or enabled the agent to practice any deception; has never held the agent out as having any general authority whatever in the premises, and if the other party trusts without enquiry, he trusts to the good faith of the agent, and not to that of the principal. Story on Agency, 125.

But to what purpose is the party dealing with the agent to enquire, respecting that which he is not to know, and what duty exists upon him to know that, which by the express direction of the principal, or from the nature of the case, is to be concealed from him? Or how can it be said that he trusts the agent, respecting the limit at which he is authorized to sell or purchase, when if he asks respecting that limit, the principal has precluded him from ascertaining what it is? Who, in fact, places confidence in the agent in a case like that above stated, and who has enabled the agent to practice deception, if deception takes place?

So far as a party dealing with a special agent is bound to enquire respecting his authority, so far he is entitled to a definite and distinct answer. And so far as he is bound to enquire and to know, it is bad faith and fraud to conceal any thing from him. But would it be deemed bad faith in the agent to say nothing as to the price at which he was instructed to sell, if the market would afford him no better? It may very safely be asserted that this is not usually practiced, either by general or special agents; and a great change in the ordinary mode of dealing must take place before the morality of contracts could be considered as requiring such a disclosure. It would certainly not be required of the owner of property, in making a sale, to state what was the lowest price he had determined to receive, if the party proposing to purchase would give no more; and it is as little expected of an agent, who is employed to get the best price he can obtain, but directed not to sell for less than a certain sum.

So in the case of a person employed to purchase, if the employment be to purchase an article at the best possible price, with private directions that he may give a certain sum, but no more. The permission to give this sum, and the direction not to exceed it, are not ordinarily to be communicated to those with whom he negotiates for a purchase, although intended to control the action of the agent himself. The employer trusts the agent.

No man is at liberty to send another into the market, to buy or sell for him, as his agent with secret instructions as to the manner in which he shall execute his agency, which are not to be commu-

nicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent—that the instructions were limitations upon his authority—and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to enquire, where enquiry would have been fruitless, and to ascertain that, of which they were not to have knowledge. It would render dealing with a special agent a matter of great hazard. If the principal deemed the bargain a good one, the secret orders would continue sealed; but if his opinion was otherwise, the injunction of secrecy would be removed, and the transaction avoided, leaving the party to such remedy as he might enforce against the agent.

From this reasoning we deduce the general principle, that where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer.

It is unnecessary to multiply instances in which the principle is applicable. It may be added that instructions which are not to be communicated to the other party are justly no more to be regarded as limitations upon the authority of the agent, than instructions not to sell unless the agent can obtain a good price, or not to purchase without he can obtain the property cheap; or, as stated by some of the evidence in this case, not to exchange "unless he could get a good five year old horse, and boot enough;" in which cases the instruction is not a limitation upon the authority, and the transaction to be held void unless the principal, or a jury, should consider that the agent had complied with the direction. The principal in such cases trusts the agent, who has a discretion in the matter (*Hicks vs. Hankin*, 4 Esp. R. 114), and it would be most mischievous to hold such direction as a condition, upon a compliance with which depended the validity of the act.

It may be otherwise if the principal directs his agent to offer his horse for sale at the sum of $100, and to take no less; or to purchase ten bales of cotton, if to be had at a certain sum, and to give no more; for in those cases the whole matter would be open to the knowledge of any one proposing to purchase, or sell, and the direc-

tion may stand as part and parcel of, and a limitation upon the authority itself.

The view we have thus taken is strongly supported by the doctrine in relation to agencies, where there is a written authority. Mr. Justice STORY, in another part of his work, speaking of agencies of that description, says: "We are, however, carefully to distinguish in all such cases, between the authority given to the agent, and the private instructions given to him as to his mode of executing that authority. For, although where a written authority is known to exist, or is, by the very nature of the transaction, presupposed, it is the duty of persons dealing with the agent to make inquiries as to the nature and extent of such authority, and to examine it; yet no such duty exists to make inquiries as to any private letter of instructions from the principal to the agent; for such instructions may well be presumed to be of a secret and confidential nature, and not intended to be divulged to third persons. Indeed, it may perhaps, be doubted, if upon this subject there is any solid distinction between the case of a special authority to do a particular act, and a general authority to do all acts in a particular business. Each includes the usual and appropriate means to accomplish the end. In each case the party ought equally to be bound by the acts of his agent, executing such authority by any of those means, although he may have given to the agent separate, private, and secret instructions of a more limited nature." Story on Agency, 70. But he adds in a note: "The case intended to be put in the text, is that of an authority distinct, and not derived from the instructions; for, if the original authority is restricted and qualified, the restrictions and qualifications constitute a part of the power itself, and govern its extent."

It is undoubtedly true that "if the original authority is restricted and qualified, the restrictions and qualifications constitute a part of the power itself, and govern its extent." But the question is, when is it so restricted and qualified, and it is not easy to distinguish the difference, in principle, between a written authority, with a private letter of instructions of a secret and confidential nature, and not intended to be divulged; and a verbal authority, with verbal instructions of a secret and confidential nature, which also are not intended to be divulged.

There is another view of the case which, perhaps, ought not to be omitted, leading to the result at which we have already

arrived. In the case of general agents, the principal will be bound by the acts of his agent, within the scope of the general authority conferred upon him, although he violates, by these acts, his private instructions and directions. He is acting within the scope of his authority, or apparent authority. So a special agent, who has private instructions for his government, but which are not to be communicated to those dealing with him, is acting within the scope of his authority, or apparent authority, when he is acting within the scope of what he is to communicate, and what only the party dealing with him is authorized to know, or is to know if he enquires.

In fact, there seems to be, in such case, a holding out of the agent, or an authorization to him to hold himself out, as having an authority beyond the private instructions intended to limit his action upon the subject matter; and upon that principle the employer should be bound. "The principle which pervades all cases of agency, whether it be a general or special agency, is this: The principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess; although he may have given him more limited private instructions unknown to the persons dealing with him." Story, 118, note. "For I am bound by the contracts which my agent makes in my name, if they do not exceed the power with which he was ostensibly invested, and it will not avail me to show that I have given him secret instructions to the contrary, which he has not pursued." 1 Livermore on Agency 107. When the principal sends his agent into the market with directions to sell for him ten bales of cotton, or a horse, and says to him that he may sell for a certain sum, if he cannot obtain more, but not to sell for less than that, and to get as much more as he can, he has not only enabled, but directed, the agent to hold himself out as having authority to sell. That matter is to be communicated to any one to whom he proposes to make a sale; and he is acting within the scope of the authority, which he is thus held out as possessing, when he makes the sale, notwithstanding he may disregard the secret limit upon the price which he was directed to require.

It is believed there is little in the cases conflicting with the views now expressed. In some of them there is a mere statement of the general principle that if a special agent exceeds his authority, his act is void. In others, the instruction was not private, or

there was a clear excess of authority. 2 Kent's Com. 484 Lec. 41; *Jeffrey vs. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Rossiter vs. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62; *Munn vs. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219; *Andrews vs. Kneeland*, 6 Cowen, (N. Y.) 357; 1 Pet. (U. S.) 264; 9 Pick. (Mass.) 542; *Denning vs. Smith*, 3 Johns. (N. Y.) ch. 344; *Fenn vs. Harrison*, 3 D. & E., 760; *East India Co. vs. Hensley*, 1 Esp. 112; *Runquist vs. Ditchell*, 3 Esp. 65; *Batty vs. Carswell*, 2 Johns. 48; *Gibson vs. Colt*, 7 Johns. 390; *Beals vs. Allen*, 18 Johns. 363, 9 Am. Dec. 221; *Thompson vs. Stewart*, 3 Conn. 183, 8 Am. Dec. 168. *Sed vide*, 11 Wend. R. 90; 15 East, 467.

In the present case, there was some contradiction in the evidence, whether any authority was given to Clark; or, if any was given, what it was. It became necessary, of course, to submit a question upon that to the jury. And from the uncertainty respecting what was said by the defendant, and how it was said, it was also left to the jury to find, in case an authority was given, how far it extended, and whether what was said about not parting with one horse unless both were disposed of, was said in a way to be a limitation upon the authority, or as mere instructions and directions. It does not seem to have appeared, distinctly, whether what was said about disposing of one only, if anything of that kind was in fact said, was a private direction to Clark, or was in fact incorporated into, and part of the authority itself. If Clark had an authority to exchange, and the defendant told him, as he himself afterwards stated, "not to part the span," but "if he could put them away, and get a good five year old horse, and boot enough, he might," this declaration, so far as it relates to a good horse, and boot enough, cannot be held to be a limitation on the authority; and if this is regarded as instructions, what was said in connection with it, about parting the span, might well partake of the same character.

The principle now settled that whatever is not to be communicated to the person with whom the agent may deal is not to be regarded as a limitation upon his authority, was not adverted to. But no objection is taken that the matter was not properly submitted to the jury, on the evidence before them, if there may be instructions to a special agent, given at the same time with the authority, which are not limitations upon his authority to execute the agency, but private directions, intended to limit his action in the matter, and a disobedience of which may make him liable to

his principal, but will not avoid the act done. It is apparent that in some cases the evidence may be of such a character that it must be submitted to a jury to determine, in effect, how far the authority, so called, extended, by finding what in fact was said by the principal, and what was intended as mere private instructions to the agent; and this seems of that description. On the view we have taken, therefore, there is nothing in the instructions upon this point, on which to set aside the verdict.

The instructions to the jury respecting a ratification were fully warranted by the evidence reported. That evidence is quite sufficient to authorize a belief that when the colt was sold, and the defendant furnished the money to make the payment to Clark, and when he was afterwards exchanged, by Emerson, with Spofford, for the mare, and he furnished the money to pay the difference, Clark and Emerson were puppets in his hands, moving as he pulled the wires. Emerson was poor, and the mare was immediately sold, as it was called, to the defendant. Upon this part of the case the jury ought to have found for the plaintiff, if there had been no evidence of any previous authority in Clark to make the exchange. 1 Livermore on Agency, 45; *Codwise vs. Hacker*, 1 Caines' R. 526; *Ward vs. Evans*, 2 Salk. 442; Story on Agency, 247, and authority cited. Having been active in the sale of the colt, the defendant's declaration that he would not sanction the trade, cannot avail him. 1 Livermore, 395; *Cornwall vs. Wilson*, 1 Ves. Sen. 509.

Judgment on the verdict.

NOTE.—*Garrard vs. Haddan*, 67 Penn. St. 82, 5 Am. Rep. 412; *Carmichael vs. Buck*, 10 Rich. (S. C.) 332, 70 Am. Dec. 226; *Webster vs. Wray*, 17 Neb. 579; *Van Duzer vs. Howe*, 21 N. Y. 531.

(26 MAINE 84, 45 AM. DEC. 96.)

BRYANT vs. MOORE.

(Supreme Judicial Court of Maine, May, 1846.)

Assumpsit. The defense was a want of consideration, and a breach of warranty. Verdict for the plaintiff, and exception by the defendant. The other facts are stated in the opinion.

Gerry, for the defendant.

Hammons, for the plaintiff.

By the Court, SHEPLEY, J. This suit is upon a promissory note, made by the defendant on March 30, 1844, and payable to Peter H. McAllaster or order. The bill of exceptions in substance states that McAllaster on that day exchanged a pair of the plaintiff's oxen with the defendant for a pair of steers, and received of the defendant a note for twelve dollars for the estimated difference in value. That he returned the steers and note to the defendant on the same day, and informed him that the plaintiff would not consent that the exchange should be thus made, but directed him to say that the "defendant must send him a note for fifteen dollars or change back." That they then spoke of a bunch on the jaw of one of the oxen, and defendant said he would give the note for fifteen dollars if McAllaster would warrant that the ox would not be injured by the bunch; that McAllaster did so warrant, and thereupon the note in suit was made.

The question presented is, whether the plaintiff is bound by that warranty. The authority of a general agent may be more or less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private, the principal will be bound, when the agent is acting within the scope of his authority, although he should violate his secret instructions. A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitations respecting the manner of doing it be public or known to the person with whom he deals, the principal will not be bound, if the instructions are exceeded or violated. If such limitations be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts.

The case of a servant of a horse dealer, who on sale of a horse warranted him to be sound in violation of his instructions, and yet bound his principal, is an example of the kind of agency last named. This case differs from it in this respect only, that the manner, in which he was to perform the particular act, was communicated to the defendant. But that makes an essential difference; for, in such case, the principal is not bound. After the first bargain the defendant was informed that McAllister had acted without authority, and

of the terms, upon which the plaintiff would make the exchange; and he had no right to conclude that McAllister had any authority to vary them. There being no warranty in the first bargain he could not be authorized to infer, that McAllister might make one as a part of the second. On the contrary, he should have been admonished, by what had taken place, that he had no general authority to make an exchange.

There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. This will not be the case, when the knowledge that the person has exceeded his authority, is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If, for instance, a merchant should authorize a broker, by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price.

But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss. When the plaintiff in this case was first informed that his agent had exceeded his authority, he had lost the services of the oxen for two months and a half; and the agent was present and denied that he had made the warranty. The defendant appears to have been sensible that the plaintiff would then suffer loss by a rescission of the contract, and to have offered compensation therefor. Whether the offer was a reasonable one or not, is immaterial, for the plaintiff, under such circumstances, was not obliged to rescind. He does not appear to have made any movement in the first instance to effect the exchange, or to have desired it, or to have been in fault when first informed of the warranty. The defendant could not at that time prescribe the terms upon which the contract should be rescinded, or insist upon it.

Exceptions overruled.

(23 NEW HAMPSHIRE, 360, 55 AM. DEC. 195.)

TOWLE vs. LEAVITT.

(Superior Court of Judicature of New Hampshire, December, 1851.)

Replevin for a phæton. Plaintiff, the owner, left the carriage with one Lane, under an agreement by which he was to make some repairs on it, and then sell it if he could. Plaintiff instructed him to sell it for forty-five dollars if possible, and if he could not get that much to take forty dollars for it. Lane's property was then under attachment and advertised to be sold. It consisted of carriages. When the sale of his property was over, Lane told the auctioneer to put up the phæton in suit for sale, having previously employed a person to bid, with directions not to let the phæton go for under forty dollars. The carriage was struck off to the defendant Leavitt for seventeen dollars, and he paid the amount and took possession of the carriage. Lane, against the defendant's objection, testified that he had no authority to sell for less than forty dollars.

The court instructed the jury that Towle, having instructed Lane not to sell the property for less than forty dollars, he had no authority to sell it for less, unless the limitation was intended to be kept secret, and that unless it appeared that the limitation was not to be disclosed, the authority of Lane was limited by it, and unless the price paid for the property was forty dollars, he could not give title to it. Verdict for the plaintiff, which the defendant moved to set aside.

Wood and *J. S. Wells*, for the defendant.

Marston, contra.

EASTMAN J. (After disposing of another question.) The questions connected with the agency of Lane, which are presented by the case, are more intricate than the one already considered, and it has not been without some difficulty that the court have arrived at a conclusion in regard to them. Upon the facts reported, it does not appear that Leavitt knew that the carriage had ever belonged to the plaintiff. This, however, would be material, only as making it, or not, necessary for Leavitt to inquire into the nature of Lane's agency in selling the property. If an agency be known, and it is special, it is the duty of the party who deals with the

agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly. *Snow vs. Perry,* 9 Pick. 542; Story on Ag. § 133; *Denning vs. Smith,* 3 Johns. Ch. 344; *Schimmelpenick vs. Bayard,* 1 Pet. 264, 290; *Hatch vs. Taylor,* 10 N. H. 547 (*ante,* p. 343.)

But where the agency is not known, and the principal has clothed the agent with powers calculated to induce innocent third persons to believe that the agent owned the property or had power to sell, the principal is bound, and strangers will not suffer. Story on Ag. § 93. In like manner, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If the principal sends his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it will be intended that the commodity is sent thither for the purpose of sale. And where an article is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser will be safe, although the agent may have acted wrongfully, and against his orders or duty, if the purchaser has no knowledge of it. Id. sec. 94; Paley on Ag. 167; 2 Kent's Com. 621; *Pickering vs. Busk,* 15 East, 38; *Everett vs. Saltus,* 15 Wend. 474; *Dyer vs. Pearson,* 3 Barr. & Cress. 42; *Hern vs. Nichols,* 1 Salk. 288; *Sanford vs. Handy,* 23 Wend. 260.

Lane was a carriage maker. His business was to make and sell carriages, and also to repair them when brought to his shop for that purpose, as was the case with this carriage of Towle's. If Lane's sole business had been to make and sell carriages, the deposit of the one in question with him might come within the principle of the preceding cases; but such was not the fact; and a purchaser would have no such right to presume that a second-hand carriage in Lane's possession was his as would protect him from the claim of a *bona fide* owner. It is to be observed, too, that this carriage was set up and sold after the property of Lane, which had been previously attached and advertised, was disposed of by the officer. The case does not so state in terms, but probably it was well known to Leavitt and others present that the carriage belonged to Towle. But, however that may have been, we think that the situation of the property was such, taken in connection with Lane's circumstances and the attachment and advertisement of his property, as to put a purchaser upon inquiry.

Assuming that Leavitt knew that Lane was acting as the special

agent of Towle in selling the property, or proceeding upon the ground that the property was so situated as to put a purchaser upon inquiry, the question arises, whether the private instructions given by Towle to Lane not to sell the carriage under forty dollars, were in the nature of a limitation to his authority, or were instructions not to be disclosed.

The acts of a general agent, known as such, govern his principal in all matters coming within the proper and legitimate scope of the business to be transacted, although he violates by these acts his private instructions; for his authority cannot be limited by any private instructions, unless known to the person dealing with him. *Whitehead vs. Tuckett*, 15 East. 400; *Lightbody vs. North American Insurance Co.*, 23 Wend. 22; *Lobdell vs. Baker*, 1 Met. 202, 35 Am. Dec. 358; 2 Kent's Com. 620; *Allen vs. Ogden*, 1 Wash. 174; Story on Ag. § 126; Paley on Ag. 200; *Fenn vs. Harrison*, 3 T. R. 757; *Munn vs. Commission Co.*, 15 Johns. 44, 8 Am. Dec. 219.

With regard to a special agent, the law appears to be equally well settled, by the authorities above quoted, that if he exceeds the authority given, his acts will not bind his principal. But it is to be observed that a distinction is to be taken between the limited authority of a special agent, one appointed for a specific purpose, to do certain and specified acts, and the private instructions given to such agent. Where the authority is limited in a *bona fide* manner, and the limitation is to be disclosed by the agent, and is disclosed either with or without inquiry, any departure from such authority or instructions will not bind the principal; but where the authority or instructions given are in the nature of private instructions, and so designed to be, they will not be binding upon the parties dealing with the agent. And if the instructions are of such a nature that they would not be communicated if an inquiry was made (even though it be the duty of the person dealing with the agent to make the inquiry), it is not necessary that it should be made, for it would not be communicated if made. *Hatch vs. Taylor*, 10 N. H. 538 (*ante*, p. 345); *Bryant vs. Moore*, 26 Me. 84, 45 Am. Dec. 96 (*ante*, p. 355).

Upon this view of the question, it would seem that the directions not to sell the carriage for less than forty dollars would be in the nature of private instructions. The fact does not seem to us to have been intended to be communicated. This, however, may admit of some doubt, and were the case to turn upon this point, a more minute examination would perhaps be necessary.

But it appears to the court, that there is one point that must settle the case for the plaintiff. This carriage was sold at auction, and this we think must be regarded as exceeding any authority or instructions given, that could bind the plaintiff. The defendant knowing the property to be the plaintiff's, or if he did not know it, the situation of the property being such as to render it incumbent on him to make all necessary inquiries, was bound, on seeing it exposed to sale in an unusual manner, to inquire as to the right of Lane thus to sell it. Had he done this, probably all difficulty would have been avoided, and whether the directions not to sell for less than forty dollars be considered as a limitation upon the agent's authority or as private instructions, nothing was said about Lane's selling at auction, and no inquiries made in regard to it. A sale at auction implies a sale at any price that may be offered. It is ordinarily the last resort to reduce property into money, and we should be slow to ratify the doings of an agent clothed with the usual powers to sell who should pursue such a course.

Had there been any evidence that Towle authorized Lane to sell the carriage at auction, so that the question could have been properly submitted to the jury, this obstacle in the defendants' case might perhaps have been overcome; but we find nothing that would warrant the court in giving the instructions desired in this respect. A court cannot be required to instruct the jury upon any supposed state of facts.

The sale, then, must be held void, and as a necessary consequence the defendant has no right to the property, and cannot sustain his defense, notwithstanding there may have been error in some of the rulings made against him.

It is unnecessary to comment further upon the questions raised in the case. We will remark, however, that Lane was a competent witness. The balance of his interest was against the party calling him. The statement in the case that the phæton was of the value of fifty dollars is evidently incidental and the mere allegation of the writ. There is no proof that it was of that value. The case of *Kingsbury vs. Smith*, 13 N. H. 110, settles the question.

Judgment on the verdict.

(86 ALABAMA, 398, 2 L. R. A. 808.)

WHEELER vs. McGUIRE.

(Supreme Court of Alabama, December, 1888.)

Action to recover for goods sold and delivered. The opinion states the facts.

J. Wheeler, for appellant.

Thos. N. McClellan, contra.

CLOPTON, J. Appellees seek to recover the price of certain goods, which they allege were sold and delivered to the appellant through T. A. Tatham as his agent. The agency was not disputed, but defendant contends that Tatham was in his employ merely as a clerk, and was not authorized to purchase goods on a credit and bind him. The plaintiffs contend that Tatham was a general agent, having authority to transact all of defendant's mercantile business, or was held out by defendant, or permitted to hold himself out as such, so as to justify the belief that he was clothed with the powers of a general agent. The question mainly controverted by the parties relates to the character of the agency, and the extent of his authority.

The general rule is that one who deals with an agent is bound to ascertain the nature and extent of his authority; but, in the application of the rule, a distinction is observed between general and special agencies. The power to do everything necessary to its accomplishment may be included in a particular agency, so that private instructions as to the particular mode of execution, which are not intended to be communicated, and are not communicated to the party with whom the agent may deal, will not be regarded as limitations on his power. But with this qualification, a special authority must be strictly pursued. A general agent may exceed his express authority, and the principal nevertheless be bound. The scope and character of the business, which he is empowered to transact, is, as to third persons, the extent and measure of his authority. By his appointment the principal is regarded as saying to the public, that he has the authority to transact the business in the usual and customary modes. Secret limitations on his power, or private instructions as to the mode of transacting the business,

will not affect the rights of third persons, who have no notice of such limitation or instructions.

When a general agent transacts the business intrusted to him, within the usual and ordinary scope of such business, he acts within the extent of his authority; and the principal is bound, provided the party dealing with the agent acts in good faith, and is not guilty of negligence which proximately contributes to the loss. *Louisville Coffin Co. vs. Stokes*, 78 Ala. 372. Third persons, dealing with a person as a general agent, are not acquitted of all duty to inquire and ascertain the character and extent of his agency, but if on inquiry, it is ascertained to be general, actually or apparently, they are not bound to inquire whether there are secret limitations, or private instructions, unless they have knowledge of facts which should put them on such inquiry. As to these issues, the burden is on the plaintiffs, to establish by proof that Tatham was the general agent of defendant, or that the latter, by acts, conduct, or negligence, justified the belief that he had authority to purchase goods on credit for the store. If these issues be found in favor of plaintiffs, no subsequent misconduct of the agent, misappropriating the goods or otherwise, will affect their rights.

After having given a general charge, which in the main is in accord with the foregoing principles, the court instructed the jury at the instance of the plaintiffs, "that if defendant employed Tatham, and put him in charge of his retail store at Wheeler's Station to conduct his mercantile business, and placed money to his credit in Louisville, Kentucky, and Nashville, Tennessee, and authorized him to use this money and also that taken in from cash sales, to replenish the stock, and instructed him not to purchase on credit; he was as to innocent third persons, the general agent of defendant in that business, and had authority to do whatever was usual or customary in conducting the same; and if plaintiffs sold to Tatham, as such agent, the goods for the price of which this suit is brought, their verdict must be for plaintiffs, unless they had notice that Tatham's authority was limited to purchases for cash." In considering the correctness of the instruction, any evidence, if there be such, tending to show that Tatham was apparently clothed with the powers of a general agent can not be taken into consideration. The proposition of the charge is that as to third persons, the facts recited therein, of themselves, without the aid of extrinsic facts and circumstances,

constituted Tatham a general agent possessing authority to purchase goods on credit, in other words, that he was a general agent as to plaintiffs, though they may have known the terms of his employment, including the deposit of money with which to purchase goods, except the instruction not to purchase on credit.

The most general powers that may be conferred on an agent are necessarily limited to the business or purpose for which the agency is created. The terms of the employment of Tatham "in charge of his retail store at Wheeler's Station to conduct his mercantile business," in connection with the limitations on his authority to purchase, limit his powers as a general agent, to the transaction of the local mercantile business of defendant. In the matter of buying goods, his power was expressly restricted to the use of money specially deposited for that purpose, and to cash receipts. In appointing Tatham his agent, defendant withheld power to buy and pledge his credit under any circumstances. By the terms of his commission, Tatham may be regarded a general agent to conduct the local business of the store, with special powers to purchase. To construe it otherwise, would be to establish the rule, that a merchant who furnishes his clerks with funds to purchase goods and make immediate payment, clothes him with power to buy on his principal's credit, and that persons dealing with him are relieved of the obligation to ascertain the nature and extent of his warrant of authority. This would press too far the application of the doctrine of general agency. *Jaques vs. Todd*, 3 Wend. (N. Y.) 83; *Clealand vs. Walker*, 11 Ala. 1058, 46 Am. Dec. 238, 1 Amer. Leading Cases, 679; 1 Pars. Contr. 43.

When an express authority is given, the extent thereof must be ascertained from its terms; and another or different authority cannot be implied, unless facts are shown from which such other authority may be presumed, or arises by implication of law. Therefore proof of facts or circumstances from which the authority is presumed, or arises by implication of law—an appearance of authority, caused not by the agent himself, but by the defendant—is essential to his liability for Tatham's acts, not within the scope of his commission. In such case, it is incumbent upon the plaintiff to prove that defendant, by ratification, assent, or acquiescence in previous acts, held out Tatham as clothed in the character in which he assumed to act, which fairly led the plaintiffs to believe that more extensive powers had in fact been given than were conferred by the terms of the appointment.

On this question, all the circumstances of the transaction, the previous conduct of the defendant, and the usages of the business, may be properly considered. It should, however, be remarked, that in order to bind the defendant by ratification, assent, or acquiescence in prior acts of his agent in excess of the authority actually given, knowledge of the material facts must be brought home to the defendant, and if, in the absence of express authority to bind defendant in the manner in which he is sought to be charged, his liability is rested on previous recognition of similar acts of Tatham as his agent, it is requisite to show that plaintiffs sold the goods to Tatham on the faith of such previous recognition. *St. John vs. Redmond*, 9 Port. Ala. 428; *Blevins vs. Pope*, 7 Ala. 371. In this aspect of the case, any evidence is relevant, which shows prior similar acts of Tatham, and tends to prove or disprove defendant's knowledge, and plaintiff's reliance on his recognition of them.

The charge under consideration is objectionable in another respect. The authority, as hypothetically stated therein, was conferred in November, 1881, when the defendant was on the eve of leaving home, to be absent for months. There is evidence tending to show that on his return, in June, 1882, the authority to purchase was revoked. The transactions with the plaintiffs were in January, February, and March, in 1883, and were the first transactions which Tatham had with plaintiffs as agent of defendant. An authority conferred is always revocable, unless coupled with an interest, or founded on a valuable consideration; and may be revoked expressly, or by acts clearly inconsistent with its continuance. When third parties have dealt with an agent clothed with general powers, the agency continues as to them, after revocation, until they have notice thereof. Also, the principal may be liable for the acts of the agent after revocation to third persons who never dealt with him previously, if they, in common with the public at large, are justified in believing that such agency existed, and have no notice of its revocation. *Claflin vs. Lenheim*, 66 N. Y. 301 (*ante*, p. 294), 1 Pars. Contr. 70.

On the case as presented by the record, these questions should have been submitted to the jury. They were withdrawn from their consideration by the instruction to find a verdict for the plaintiffs, independent of the evidence in regard to the revocation of the authority of Tatham, and notice to plaintiffs.

The court also charged the jury that if the defendant placed Tatham in charge of his retail store, with instructions to buy for

cash only, it was the duty of defendant to keep himself posted as to the manner in which his agent conducted his business, and to see that his instructions were obeyed; and if he knew the agent was buying on credit, or could have known it by the exercise of ordinary diligence, he is estopped to deny the authority of Tatham to purchase on credit. The rule is stated by Mr. Wharton as follows:

"When a principal conducts his affairs so negligently, as to lead third persons to reasonably suppose that his agent has full powers, then if the agent exceeds his authority the principal must bear the loss. It is true that the principal is not chargeable with *culpa levessima*. He is not chargeable, in other words, with the consequences of those slight negligences into which good business men are liable to fall. But, if he is negligent to an extent beyond what is usual with good business men in his department, and if in consequence of his negligence, third parties repose trust on the supposed agent, then the loss, if loss accrue, must fall on the principal." Whart. on Agency, § 123.

Though mere negligence, mere want of ordinary diligence, may furnish the agent an opportunity of undue assumption of authority, it does not of itself work an estoppel. A principal is not required to distrust his agent, nor to keep a vigilant watch over the manner in which he exercises his authority, and to see that his instructions are obeyed. He may act on the presumption that third parties, dealing with his agent, will not be negligent in ascertaining the extent of his authority, as well as the existence of his agency. And negligence, to constitute a ground of liability, must have caused the plaintiffs to repose trust on the authority of Tatham, and the negligence of plaintiffs must not have proximately contributed to the loss. The charge exacts of the principal a degree of diligence not required by the law.

Many cases hold that notice to an agent is notice to his principal, though acquired before the relation is created, if present in his mind at the time of the particular transaction, and he can communicate it or act upon it, without violating a legal moral duty. It was, however, early settled in this State, that knowledge of an agent, to operate as constructive notice to the principal, must have been acquired after the relation of principal and agent was formed. This rule having been followed ever since, whatever might be our opinion were it an open question, it would not be prudent to disturb it now. *Mundine vs. Pitts*, 14 Ala. 84; *McCormick vs. Joseph*, 83 Ala. 401; *Frenkel vs. Hudson*, 82 Ala. 158.

If the jury should find that the evidence as to any fact, essential to plaintiff's rights of recovery, and as to which the burden of proof rests on them, is evenly balanced, or in equilibrium, their verdict must be for the defendant. *Vandeventer vs. Ford,* 60 Ala. 610.

We have not deemed it necessary to specifically consider the numerous exceptions to the rulings of the court on the evidence, and in instructing the jury, each of which is assigned for error. We have endeavored to select such as related to the issues properly made by the evidence in its different aspects, and involved the principles on which the rights of the parties must ultimately depend, and which should govern the court in putting the case before the jury. Evidence which proximately tends to prove or disprove these principal issues should be received; and that excluded which is incapable of affording a reasonable presumption of their truth or falsity. And charges based on partial facts, ignoring other material facts, such as a bare shipment of goods to defendant, and the appropriation of them to his use by him or his authorized agent, omitting reference to the fact of a prior purchase, and Tatham's authority, are calculated to mislead and confuse the jury, and should not be given.

Reversed and remanded.

(124 PENNSYLVANIA STATE, 291, 10 AM. ST. REP. 585, 2 L. R. A. 823.)

HUBBARD vs. TENBROOK.

(Supreme Court of Pennsylvania, March, 1889.)

Action to recover for goods sold to the alleged agents of defendants. Plaintiffs recovered and defendants bring error.

Joseph L. Tull, for plaintiffs in error.

Joseph De F. Junkin, for defendants in error.

MITCHELL, J. (After criticizing the plaintiffs' statement.) Fortunately for the plaintiffs, their statement is helped out, as to the first fact, by the bill of particulars, which, being sworn to be a copy of their book of original entry, imports delivery as well as sale.

The agency, though stated in the objectionable form of an inference from the previously recited evidence, is clearly intended to be averred and may fairly be so treated.

Taking the statement therefore in its plain intent, it sets out that the plaintiffs sold and delivered a quantity of hams to one Sides, who was conducting a grocery business in his own name, but with the property and as the agent of defendants. The defendants filed an affidavit of defense, and a supplementary one, the substance of which is that "Sides was not the agent of defendants to purchase from plaintiffs or anyone else," and that he "was employed as salesman only, by said defendants without any authority whatever to act for or bind defendants for the purchase of any goods or merchandise upon credit of the said defendants."

We have thus the question presented, whether an agent may be put forward to conduct a separate business in his own name, and the principal escape liability by a secret limitation upon the agent's authority to purchase.

The answer is not at all doubtful. A man conducting an apparently prosperous and profitable business obtains credit thereby, and his creditors have a right to suppose that his profits go into his assets for their protection in case of a pinch or an unfavorable turn in the business. To allow an undisclosed principal to absorb the profits, and then when the pinch comes to escape responsibility on the ground of orders to his agent not to buy on credit, would be a plain fraud on the public.

No exact precedent has been cited. None is needed. The rule so vigorously contended for by the plaintiffs in error, that those dealing with an agent are bound to look to his authority, is freely conceded; but this case falls within the equally established rule that those clothing an agent with apparent authority are, as to parties dealing on the faith of such authority, conclusively estopped from denying it.

The affidavits set up no available defense, and the judgment is affirmed.

NOTE.—See following case.

(LAW REPORTS (1893), 1 QUEEN'S BENCH DIVISION, 346.)

WATTEAU vs. FENWICK.

(English Court of Queen's Bench, December, 1892.)

Action for goods sold. The opinion states the facts.

Finlay, Q. C. (*Scott Fox* with him), for defendants.

Boydell Houghton, for plaintiff.

WILLS, J. The plaintiff sues the defendants for the price of cigars supplied to the Victoria Hotel, Stockton-upon-Tees. The house was kept, not by the defendants, but by a person named Humble, whose name was over the door. The plaintiff gave credit to Humble, and to him alone, and had never heard of the defendants. The business, however, was really the defendants', and they had put Humble into it to manage it for them, and had forbidden him to buy cigars on credit. The cigars, however, were such as would usually be supplied to and dealt in at such an establishment. The learned county court judge held that the defendants were liable. I am of opinion that he was right.

There seems to be less of direct authority on the subject than one would expect. But I think that the Lord Chief Justice during the argument laid down the correct principle, viz.: Once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal.

But in the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will

avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion.

The principle laid down by the Lord Chief Justice, and acted upon by the learned county court judge, appears to be identical with that enunciated in the judgments of COCKBURN, C. J., and MELLOR, J., in *Edmunds vs. Bushell*, Law Rep. 1 Q. B. 97, the circumstances of which case, though not identical with those of the present, come very near to them. There was no holding out, as the plaintiff knew nothing of the defendant. I appreciate the distinction drawn by Mr. Finlay in his argument, but the principle laid down in the judgments referred to, if correct, abundantly covers the present case. I cannot find that any doubt has ever been expressed that it is correct, and I think it is right, and that very mischievous consequences would often result if that principle were not upheld.

In my opinion, this appeal ought to be dismissed with costs. Lord COLERIDGE, C. J., concurred.

Appeal dismissed.

NOTE.—Compare with the preceding case.

CHAPTER II.

OF THE CONSTRUCTION OF THE AUTHORITY GENERALLY.

(36 PENNSYLVANIA STATE, 498, 78 AM. DEC. 390.)

LOUDON SAVINGS FUND SOCIETY vs. HAGERSTOWN SAVINGS BANK.

(Supreme Court of Pennsylvania, 1860.)

This was an action of assumpsit brought by the bank against forty-three persons doing business in the name of the Loudon Savings Fund Society, to recover on a certificate of deposit signed by one Easton, the treasurer of the society. The defendants denied his authority to make or issue the certificate. The court below directed a verdict for the plaintiff.

Reilly & Sharpe, for plaintiffs in error.

McLelland & McClure, for defendant in error.

WOODWARD, J. (After stating the facts.) It is apparent that the great question raised upon the record had reference to the character and extent of Easton's authority as the agent of the defendants. The party who avails himself of the act of an agent must, in order to charge the principal, prove the authority under which the act is done. If the authority be created by power of attorney or other writing, the instrument itself must in general be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are, in such cases, questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name, and in many cases the acts of an agent, though not in conformity to his authority, may yet be binding upon his employer, who is left in such cases to seek his remedy against his agent. Whether an employer be or be not bound by such acts as

are not conformable to the commission given by him, depends principally upon the authority being general or special.

By a general agent is understood not merely a person substituted in the place of another, for transacting all manner of business, but a person whom a man puts in his place to transact all his business of a particular kind, as to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment, and that power cannot be limited by any private order or restriction, not known to the party dealing with the agent. A special agent is one who is employed about one specific act or certain specific acts only, and he does not bind his employer unless his authority be strictly pursued. Paley on Agency, 199 *et seq.* "A general authority," said Lord ELLENBOROUGH, in *Whitehead vs. Tuckett*, 15 East, 408, "does not import an unqualified one, but that which is derived from a multitude of instances; whereas a particular authority is confined to an individual instance." And in all instances where the authority, whether general or special, is to be implied from the conduct of the principal or where the medium of proof of agency is *per testes*, the jury are to judge of the credibility of witnesses and of the implications to be made from their testimony.

As the plaintiff here did not produce any written evidence of Easton's agency, it was the duty of the court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions: 1. Whether the evidence satisfied them that Easton was either the general or special agent of the defendants; and, 2, Whether the issuing of the certificate in suit was within the scope of his authority. *Peries vs. Aycinena*, 3 Watts & S. 79; *Jordan vs. Stewart*, 23 Pa. St. 247; *Seiple vs. Irwin*, 30 Id. 513; *Williams vs. Getty*, 31 Id. 461, 72 Am. Dec. 757.

Or, if it was not a case of strict agency, if Easton acted without any authority in issuing the certificate, or transcended such as had been delegated to him, the question of ratification by the defendants was also a mixed question of law and fact. What would in law amount to a ratification was for the court; whether such proofs were found in the case, was for the jury. Such adoptive authority relates back to the time of the original transaction, and is deemed, in law, the same to all purposes as if it had been given before. *Lawrence vs. Taylor*, 5 Hill (N. Y.), 107–113; and see 1 Liver-

more on Principal and Agent, 44–50; *Philadelphia W. & B. Railroad Company vs. Cowell*, 28 Pa. St. 337, 70 Am. Dec. 128. * *
Reversed.

NOTE.—See, also, *Millay vs. Whitney*, 63 Me. 523; *Hartford Ins. Co. vs. Wilcox*, 57 Ill. 182; *Rountree vs. Denson*, 59 Wis. 522; *Danby vs. Coutts*, L. R. 29 Ch. Div. 500.

(72 NEW YORK, 279, 28 AM. REP. 150.)

CRAIGHEAD vs. PETERSON.

(New York Court of Appeals, January, 1878.)

Peterson gave to Packard, his son-in-law, a power of attorney authorizing Packard "to draw and indorse any check or checks, promissory note or notes, on any bank in the city of New York in which I may have an account, and especially in the Irving National Bank of said city, and to do any and all matters and things connected with my account in said Irving National Bank, or any other bank in said city, which I myself, might or could do," etc. The words "promissory note or notes," were interlined. Packard executed in the name of Peterson, and delivered to plaintiff's testator, two promissory notes, payable at a bank where Peterson had no account. Afterwards, at Packard's request, Peterson executed a mortgage, upon lands really owned by Packard, but title to which had been taken in Peterson's name without his knowledge, to secure the payment of the notes executed by Packard. Peterson supposed the mortgage was for the benefit of Packard or his wife, and did not know that it was given to secure notes purporting to be executed by him. The notes were not given in Peterson's business nor for his benefit. In an action on the notes, defendant had judgment, and plaintiff appealed.

A. C. Franseoli, for appellants.

W. H. Van Cott, for respondents.

ALLEN, J. The plaintiffs' testator, taking the notes in suit, made by an agent professing to represent the defendant as his principal, is presumed to have known the terms of the power under which the agent assumed to act. He was bound to ascertain and know the character and extent of the agency, and the words of the

instrument by which it was created, before giving credit to the agent. If the testator dealt with the agent without learning the extent of the powers delegated to him, he did so at his peril, and must abide by the consequences, if the agent acted without or in excess of his authority. Story on Agency, § 72. If there was an ambiguity in the language of the power of attorney, there is no reason why in this case there should be a forced or unnatural interpretation of the instrument to save the testator or his representatives from loss. The transaction was in the city of New York where as well the supposed principal, as Mr. Pike, the plaintiffs' testator, and the professed agent resided, and if the power of attorney was ambiguous in its expression, or of doubtful interpretation, the defendant was accessible either to make the notes in person, or assent to and ratify the act of the agent.

There may be cases in which, from necessity, a party dealing with an agent must act upon his own interpretation of the authority, and take the risk of any doubtful or ambiguous phraseology. But not so here. The record is barren of evidence as to the origin or consideration of the notes. The powers conferred upon the agent were limited, and by the power of attorney as first drawn, Packard, the agent, was only authorized to draw and indorse checks on any bank in which the testator had an account, "and to do any and all matters and things connected with his (my) account in" such banks which the principal might or could do. The last and general words only gave general powers to carry into effect the special purposes for which the power was given. *Attwood vs. Munnings*, 7 B. & C. 278; *Perry vs. Holl*, 2 DeG. F. & J. 38; *Rossiter vs. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; Story on Agency, § 62.

The primary and special purpose of the power of attorney was to authorize Packard to draw checks in the business of the principal upon and against his accounts in bank, and to indorse checks probably for deposit to the credit of the same accounts. The insertion of the words "promissory note or notes" by an interlineation after "check or checks," and before "on any bank," etc., must be read with the limited and special purpose of the power as first prepared in view, and not as intending to give a more extended or general power. The making and indorsing of promissory notes, either for discount or payable at the principal's bank, was a natural adjunct of the authority given to draw and indorse checks, and thus deal with and in respect of the bank accounts of the testator.

The dealings and business relations of the testator with the banks with whom he dealt, and his accounts with such banks, was the subject of the agency, and the instrument creating the agency restricted the powers of the agent to the making and indorsing of commercial instruments having an immediate connection with the banks with which the principal had dealings and which would properly enter into his accounts with them.

The act of making the notes in suit was *ultra vires*, and the defendant is not liable thereon. A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction, etc., in commercial transactions which are interpreted most strongly against the writer, especially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations. *Wood vs. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Attwood vs. Munnings, supra; Hubbard vs. Elmer*, 7 Wend. (N. Y.), 446, 22 Am. Dec. 590; *Hodge vs. Combs*, 1 Black (U. S.) 192.

The evidence of ratification and adoption of the acts of the agent by the giving the mortgages is very slight. The evidence is that the title to the property mortgaged was but nominally in the defendant, having been taken in his name without his knowledge, and as is to be inferred, by Packard, the real owner, and this mortgage with another was executed at the request and as was supposed by the defendant, for the benefit of Packard or his daughter, and upon transactions with which the defendant had no connection.

The reading of the recital of the considertion by the gentleman who presented the mortgage to the defendant for execution at the request of Packard, cannot be said to have given him an intelligent appreciation of the fact recited, or the effect it would have upon the legal liability of the defendant, who testified that he did not understand or know that the mortgage was given to secure notes of which he was the maker. The evidence is very decided that the notes were not given in the business of the defendant or for his benefit, and he had never received any benefit or derived any advantage from them so far as appears. A ratification under such circumstances should be the deliberate and intentional act of the party sought to be charged with full knowledge of all the cir-

cumstances. Story on Agency, § 239. The jury have found upon satisfactory evidence that there has been no adoption of these notes, or ratification of Packard's acts by the defendant.

There was no error in the admission of evidence. All the testimony offered and given by the defendant was in respect to the *res gestæ*, and the transactions given in evidence by the plaintiffs, and to disprove any connection with the making of the notes, or the consideration upon and for which they were made, and the relation in which he stood to the property mortgaged, and was all competent, bearing more or less directly upon the question of agency and the alleged ratification of the acts of the agent.

The question to the defendant, as to his intent to ratify the giving the notes, was not the most appropriate interrogatory to draw out the evidence sought. The intent of the act was immaterial, if the defendant had deliberately and understandingly executed a deed reciting the notes as made by him and covenanting to pay them. The legal effect of such an instrument would not be evaded by the want of an actual intent to confirm the acts of the agent by whom the notes were made. The answer of the witness only went to the fact that he did not deliberately and understandingly execute the mortgage as one given to secure these two notes as his notes past due.

There was no error upon the trial, and the judgment must be affirmed.

NOTE.—See, also, *Vanada vs. Hopkins*, 1 J. J. Marsh, (Ky.) 285, 19 Am. Dec. 92; *Reese vs. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Franklin vs. Ezell*, 1 Sneed, (Tenn.) 497; *Strong vs. Stewart*, 9 Heisk. (Tenn.) 137; *Benjamin vs. Benjamin*, *ante*, p. 72; *Huntley vs. Mathias*, *post*, p. 408; *Graves vs. Horton*, *ante*, p. 82; *Shackman vs. Little*, 87 Ind. 187.

(44 NEW JERSEY LAW, 257.)

CAMDEN SAFE DEPOSIT AND TRUST COMPANY vs. ABBOTT.

(Supreme Court of New Jersey, June, 1882.)

Action upon a promissory note drawn to the order of J. R. Abbott, and signed with the name of defendant by J. R. Abbott, who acted under a power of attorney stating, "This is to certify

that J. R. Abbott * * * is this day appointed with power of attorney, and authorized by me to sign my name to any paper or papers, notes, etc.—T. Abbott." Verdict for plaintiff, and rule to show cause why a new trial should not be granted.

Chas. T. Reed, for the rule.

Samuel H. Grey, contra.

DIXON, J. (After stating the facts.) On the trial a question was raised whether the words, "notes, etc.," were not added fraudulently after the defendant had executed the instrument, but the jury found against this proposition. Such an inquiry seems scarcely important, for the language of the power, without those words, is so general that it is hardly possible to interpret them in such manner as to exclude an authority to sign notes on proper occasions. But, in whichever form the instrument was delivered, it did not justify the signing of notes for purposes outside of the principal's business. *Gulick vs. Grover,* 33 N. J. L. 465, 97 Am. Dec. 728; *Stainer vs. Tysen,* 3 Hill, (N. Y.) 279. The note in suit was not given for such a purpose, but was put forth for the personal benefit of the attorney, who converted its proceeds to his own use. It was, therefore, issued under an apparent authority, but in fraud of the principal. The holders of such notes can recover of the principal only on showing that they took them for value, before maturity, and *bona fide. North River Bank vs. Aymar,* 3 Hill, (N. Y.) 262; *Duncan vs. Gilbert,* 29 N. J. L. 521; *Hamilton vs. Vought,* 34 N. J. L. 187; *Bird vs. Daggett,* 97 Mass. 494.

The only evidence touching this matter, in the record before us, is that the attorney received the amount of the note, but when, from whom, and under what circumstances, do not appear.

The verdict for the plaintiff must therefore be set aside, and a new trial granted.

NOTE.—Authority must be construed as authorizing execution only in the separate private business of the principal and for his benefit. *Steinback vs. Read,* 11 Gratt. (Va.) 281, 62 Am. Dec. 648; *Attwood vs. Munnings,* 7 Barn. & Cress. 278; *Wood vs. McCain,* 7 Ala. 800, 42 Am. Dec. 612; *Adams Express Co. vs. Trego,* 35 Md. 47.

CHAPTER III.

OF THE CONSTRUCTION OF AUTHORITIES OF CERTAIN KINDS.

I.

OF AGENT AUTHORIZED TO SELL LAND.

(99 UNITED STATES, 668.)

LYON vs. POLLOCK.

(Supreme Court of the United States, October, 1878.)

In this action it was sought to have a deed, purporting to be executed from Lyon to Pollock, by one Paschal as his agent, but which had been held to be insufficient to pass the title, declared to be a contract to convey, and, as such, to be specifically enforced. Decree below for such performance. Defendant appeals.

Philip Phillips and *W. H. Phillips,* for the appellant.

No counsel for appellee.

FIELD, J. This case turns upon the construction given to the letter of Lyon to Paschal, of the 24th of August, 1865. That letter clearly did not authorize the execution of a conveyance by Paschal in the name of Lyon to the purchaser. Its insufficiency in that respect was authoritatively determined in the action at law for the land; the instrument executed by Paschal as the deed of Lyon being held inoperative to pass the legal title. The question now is, was the letter sufficient to authorize a contract for the sale of the lots? To determine this, and give full effect to the language of the writer we must place ourselves in his position, so as to read it, as it were, with his eyes and mind.

It appears from his answer, as well as his testimony, that he was in great danger of personal violence in San Antonio, shortly after the commencement of the rebellion, owing to his avowed hostility to secession, or at least that he thought he was in such danger. He apprehended that his life was menaced, and was in consequence induced to flee the country. He possessed at the time a large amount of property, real and personal, in San Antonio.

This he confided to the care of his partner, Bennett, to whom he gave a power of attorney, authorizing him to take charge of and control the same, and sell it for whatever consideration and upon such terms as he might judge best, and execute all proper instruments of transfer; and also to collect and receipt for debts due to him. Bennett took possession of Lyon's property and managed it until July, 1865, when he transferred it, with the business and papers in his hands, to Paschal, and at once informed Lyon by letter of the transfer. It was under these circumstances that the letter of Lyon to Paschal, which is the subject of consideration, was written. Its language is: "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I will be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate."

Situated as Lyon then was, a fugative from the state, it could hardly have been intended by him that if propositions to purchase his property or any part of it were made to Paschal, they were to be communicated to him, and to await his approval before being accepted. He was at the time at Monterey, in Mexico, and communication by water between that place and San Antonio was infrequent and uncertain; and he states himself that it was impossible to send letters by Matamoras, as the road was blockaded. Writing under these circumstances, we think it clear that he intended by his language, what the words naturally convey, that if an opportunity to sell his property presented itself to Paschal, he should avail himself of it and close a contract for its sale. His subsequent conduct shows, or at least tends to show, that such was his own construction of the letter, and that he approved, or at least acquiesced in, the disposition made of his property. * * * Holding the letter to confer sufficient authority to contract for the sale of Lyon's real property in San Antonio, there can be no doubt of the right of the complainants to the relief prayed. The deed executed to them by Paschal in the name of Lyon, though invalid as a conveyance, is good as a contract for the sale of the property described in it; and is sufficient, therefore, to sustain the prayer of the bill for a decree directing Lyon to make a conveyance to them. Decree affirmed.

NOTE—See, also, *Marr vs. Given*, 23 Me. 55, 39 Am. Dec. 600; *Rice vs. Tavernier*, 8 Minn. 248, 83 Am. Dec. 778; *DeCordova vs. Knowles*, 37 Tex. 19; *Billings vs. Morrow*, 7 Cal. 171, 68 Am. Dec. 235.

(45 MINNESOTA, 121, 22 AM. ST. REP. 724.)

GILBERT vs. HOW.

(Supreme Court of Minnesota, December, 1890.)

Ejectment. Plaintiff claimed title by virtue of a foreclosure proceeding, to which George A. Bucklin was made the sole defendant. Bucklin derived his title through Mary A. Clark under a conveyance purporting to be made by Mary A. Clark and Benjamin F. Bucklin, by Franklin Chase, their attorney in fact. Judgment below for defendant.

H. J. Peck, for appellant.

Southworth & Coller, for respondent.

COLLINS, J. The deed in which Mary A. Clark and B. F. Bucklin were named as grantors, and George A. Bucklin as grantee, was executed by Bucklin in person, and by Franklin Chase in behalf, and as the attorney in fact, of Mary A. Clark. The land described therein was then the sole property of the grantor last mentioned, so far as was shown by the record, Bucklin having no interest in it. The power of attorney, by virtue of which Chase assumed to act, was a joint power, executed and delivered to him by Mary A. Clark and B. F. Bucklin. By its terms, the latter constituted and appointed Chase "our true and lawful attorney for us, and in our names," to enter upon and take possession of all lands "to which we are or may be in any way entitled or interested, and to grant, bargain, and sell the same, * * * and for us and in our names to make * * * and deliver good and sufficient deeds; * * * and we do hereby further constitute the said Chase our attorney, and in our names to transact and manage all business; * * * and also in our names to demand, sue for, recover, and receive all sums of money," etc.

All powers of attorney receive a strict interpretation, and the authority is never extended by intendment, or construction, beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued. *Rossiter vs. Rossiter,* 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Brantley vs. Insurance Co.,* 53 Ala. 554; *Bliss vs. Clark,* 16 Gray, (Mass.) 60. This rule was applied in *Rice vs. Tavernier,* 8 Minn. 248, 83 Am. Dec. 778; *Greve vs. Coffin,* 14 Minn. 345, 100

Am. Dec. 229; *Berkey vs. Judd*, 22 Minn. 287. And a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril. *Sandford vs. Handy*, 23 Wend. (N. Y.) 260; *Nixon vs. Hyserott*, 5 Johns. (N. Y.) 58.

The power under which Chase pretended to convey a tract of land, the sole property of Mary A. Clark, must be construed as authorizing him to convey such lands, only, as were held and owned by his two constituents jointly, or in common, and not the lands held and owned by either, and separately. By its terms, the attorney was not empowered to convey land held and owned as the undivided property of one, and in which the other had no interest, nor was he given authority to transact any business, except that in which the parties were jointly concerned. The authority was special, and the written power joint, in form. No mention was made of the separate property or business of either of the parties who executed it, and it cannot be inferred that they intended to confer upon Chase the power to convey such property, or to transact such business. *Dodge vs. Hopkins*, 14 Wis. 630 (*ante*, 215); *Johnston vs. Wright*, 6 Cal. 373. This rule is also recognized in *Holladay vs. Daily*, 19 Wall. (U. S.) 606, although the point was not directly in issue. The deed referred to was a nullity, and did not convey the land to George A. Bucklin, and, when the mortgage given by Mary A. Clark was foreclosed by action brought against Bucklin alone, the proper party, the owner of the land, was not made a defendant.

The foreclosure sale was void, and a purchaser thereat acquired no interest in the land sold. As the plaintiff's rights were predicated upon this sale, he failed to establish title to the land in himself upon the trial.

Affirmed.

NOTE.—See note to the principal case in 23 American State Reports, 726. See, also, *Deakin vs. Underwood*, *ante* p. 68.

(8 HOWARD, 451.)

LEROY vs. BEARD.

(United States Supreme Court, January, 1850.)

This was an action by Beard against LeRoy and wife to recover for the breach of a warranty contained in a deed executed by LeRoy and wife through an agent Starr, by authority of a letter of attorney. Verdict for plaintiff, and defendants allege error.

Mr. Blunt and *Mr. Webster,* for plaintiff in error.

Mr. Seeley and *Mr. Baldwin,* for defendant in error.

WOODBURY, J. (After disposing of another question.) The next instruction to which the original defendant objected, and which is the chief and most difficult one that can properly be considered by us, under the present bill of exceptions, is that the power of attorney by LeRoy and his wife to Starr, their agent, was broad enough to confer upon him "authority to give a deed of the land with covenant of warranty."

This power of attorney is given in *extenso* in the statement of the case. It appears from its contents that LeRoy, after authorizing Starr to invest certain moneys in lands and real estate in some of the western states and territories of the United States, at the discretion of the said Starr, empowered him "to contract for the sale of and to sell either in whole or in part, the lands and real estate so purchased by the said Starr," and "on such terms in all respects as the said Starr shall deem most advantageous." Again he was authorized to execute "deeds of conveyance necessary for the full and perfect transfer of all our respective right, title," etc., "as sufficiently in all respects as we ourselves could do personally in the premises," "and generally as the agent and attorney of the said Jacob Le Roy" to sell "on such terms in all respects as he may deem most eligible."

It would be difficult to select language stronger than this to justify the making of covenants without specifying them *eo nomine* When this last is done, no question as to the extent of the power can arise, to be settled by any court. But when, as here, this last is not done, the extent of the power is to be settled by the language employed in the whole instrument (4 Moore, 448) aided by the situation of the parties and of the property, the usages of the coun-

try on such subjects the acts of the parties themselves, and any other circumstance having a legal bearing and throwing light upon the question.

That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant would seem naturally to be inferred, first from its leaving the terms of the sale to be in all respects as Starr shall deem most advantageous. "Terms" is an expression applicable to the conveyances and covenants to be given, as much as to the amount of, and the time of paying, the consideration. *Rogers vs. Kneeland,* 10 Wendell, (N. Y.) 219. To prevent misconception, this wide discretion is reiterated. The covenants, or security as to the title, would be likely to be among the terms agreed on, as they would influence the trade essentially, and in a new and unsettled country must be the chief reliance of the purchasers.

To strengthen this view, the agent was also enabled to execute conveyances to transfer the title "as sufficiently in all respects as we ourselves could do personally in the premises," and it is manifest that inserting certain covenants which would run with the land might transfer the title in some events more perfectly than it would pass without them; and that, if present "personally," he could make such covenants, and would be likely to if requested, unless an intention existed to sell a defective title for a good one, and for the price of a good one. It is hardly to be presumed that anything so censurable as this was contemplated.

Again, his authority to sell, "on such terms in all respects as he may deem most eligible," might well be meant to extend to a term or condition to make covenants of seizin or warranty, as without such he might not be able to make an eligible sale, and obtain nearly so large a price.

Now all these expressions, united in the same instrument, would prima facie, in common acceptation, seem designed to convey full powers to make covenants like these, and although a grant of powers is sometimes to be construed strictly, (Com. Dig. Poiar, B. 1 and c 6; 1 Bl. R. 283;) yet it does not seem fit to fritter it away in a case like this, by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it by receiving a large price, that otherwise would probably never have been paid. *Nind vs. Marshall,* 1 Brod. and Bingh. 319; 10 Wendell, 219, 252. This he must refund when the title

fails, or be accessory to what seems fraudulent. 1 J. J. Marsh, 292. Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is their position or situation as disclosed in the instrument itself. *Solly vs. Forbes,* 4 Moore, 448. LeRoy resided in New York, and Starr was to act as his attorney in buying and selling lands in the "Western States and Territories," and this very sale was as remote as Milwaukee, in Wisconsin. For aught which appears, LeRoy, Beard, and Starr, were all strangers there, and the true title to the soil little known to them; and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying.

The usages of this country are believed, also, to be very uniform to insert covenants in deeds. In the case of the *Lessee of Clark vs. Courtney,* 5 Peters, (U. S.) 349, Justice STORY says: "This is the common course of conveyances," and that in them "covenants of title are usually inserted." See, also, 6 Hill, (N. Y.) 338. Now if in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine that, from usage as well as otherwise, a warranty by the agent was proper and would be binding on the principal.

It is true that some of these cases relate to personal estate, and some perhaps should be confined to agents who have been long employed in a particular business, and derive their authority by parol, no less than by usage, and consequently may not be decisive by analogy to the present case. 3 D. & E. 757; *Helyear vs. Hawke,* 5 Es. Ca. 72, note; *Pickering vs. Busk,* 15 East. 45; 2 Camp N. P. 555; 6 Hill (N. Y.) 338; 4 D. & E. 177.

So of some cases which relate to the quality and not to the title of property. *Andrews vs. Kneeland,* 6 Cowen, (N. Y.) 354; The Monte Allegre, 9 Wheat. (U. S.) 648; 6 Hill, (N. Y.) 338.

But where a power to sell or convey is given in writing, and not aided, as here, by language conferring a wide discretion, it still must be construed as intending to confer all the usual means or sanction the usual manner of performing what is intrusted to the agent. 10 Wendell, 218; *Howard vs. Baillie,* 2 H. Bl. 618; Story on Agency, p. 58; *Dawson vs. Lawly,* 5 Es. Ca. 65; *Ekins vs. Maclish,* Ambler, 186; Salk. 283; *Jeffrey vs. Bigelow,* 13 Wend. (N. Y.) 527; 28 Am. Dec. 476; 6 Cowen, (N. Y.) 359. Nor is the

power confined merely to usual "modes and means," but whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority. 6 Hill, (N. Y.) 338; 2 Pick. Mass. 345; Bell on Com. L. 410; 2 Kent's Com. 618; *Vanada vs. Hopkins*, 1 J. J. Marsh, (Ky.) 287, 19 Am. Dec. 92; *Sandford vs. Handy*, 23 Wendell, (N. Y.) 268. We have already shown that, under all the circumstances, a covenant of warranty here was not only usual, but appropriate and reasonable.

Again, "All powers conferred must be construed with a view to the design and object of them." 1 J. J. Marsh, 287. Here, that design was manifestly in the discretion of the agent, to sell as he might deem most advantageous. Again, if a construction be in some doubt, not only may usage be resorted to for explanation (Story on Agency, p. 73; 5 D. & E. 564), but the agent may do what seems from the instrument plausible and correct, and though it turns out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent. *Lomax vs. Cartwright*, 3 Wash. C. C. 151; 2 Ib. 133; 4 Ib. 551; 6 Cowen, 358, in *Andrews vs. Kneeland*. Because the person who deals with the agent is required, like him, to look to the instrument to see the extent of the power (7 Barn. & Cres. 278; 1 Peters, 290); and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the principal, for not employing clearer terms. 2 Barn. & Ald. 143, in *Baring vs. Corrie;* 1 Peters, (U. S.) 290; *Courcier vs. Ritter*, 4 Wash. C. C. 551; 23 Wend. 268.

In the next place, the acts of the parties themselves, tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts, it is competent to consider in order to remove doubt. 17 Pick, 222; 1 Metcalf, 378; Paley on Agency, 198; *Mechanics' Bank of Alexandria vs. Bank of Columbia*, 5 Wheat. (U. S.) 326; and Bac. Abr. Covenant, F.; 5 D. & E. 564; 1 Greenleaf on Ev. § 293.

The agents' acts on this subject are strong. He construed the instrument as if empowering him to make the warranty, and made it accordingly. He was to gain nothing for himself by such a course, if wrong, and does not appear to have done it collusively with anybody. 2 Bro. ch. 638.

The principal, too, when asked for redress, and when corresponding on the subject, does not appear to have set up as a defense, that he

did not intend, by this instrument, to authorize a conveyance with warranty. On the contrary, for some time he conducted himself towards both the agent and the plaintiff as if he had meant covenants should be made. 14 Johns. 238; *All Saints Church vs. Lovett*, 1 Hall, 191.

Finally, the decided cases on this question, though in some respects contradictory, present conclusions as favorable to this construction as do the peculiar language used in the power and the weight of analogy. See 23 Wendell, 260, 267, 268; *Nelson vs. Cowing*, 6 Hill, 336; *Vanada vs. Hopkins*, 1 J. J. Marsh, 293; 13 Wendell, 521, *Semble*.

Some earlier cases were contra. *Nixon vs. Hyserott*, 5 Johns. (N. Y.) 58; *Van Eps vs. Schenectady*, 12 Johns. (N. Y.) 436, and *Ketchum vs. Evertson*, 13 Johns. 365; 7 Johns. 390.

But in these the power was merely to give a deed of a certain piece of property, and could be construed as it was without directly impugning our views here; whereas, in the present case, the power was manifestly broader in terms and design. *Wilson vs. Troup*, 2 Cowen (N. Y.) 195, 14 Am. Dec. 458; 6 Cowen, 357.

The earlier cases in New York, bearing on this subject are also considered by its own courts as overruled by the later ones. BRONSON, J., in 6 Hill, 336.

It may be proper to add, that the general conclusions to which we have arrived are more satisfactory to us, if not more right, because they accord with what appears to be the justice of the case, which is, that the plaintiff should not keep money which would probably not have been obtained except by these very covenants, and which it must be inequitable, therefore, to retain and at the same time avoid the covenants.

The judgment below is affirmed.

NOTE.—In *Schultz vs. Griffin*, (1890) 121 New York, 294, it is said: "The rule that an agent to sell personal property has implied power to warrant, in the absence of any restriction, where sale with warranty is usual and customary in similar cases, was declared in *Nelson vs. Cowing*, 6 Hill, 336, substantially overruling *Gibson vs. Colt*, 7 Johns. 490. There seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases. The great preponderence of authority now is that a power without restriction to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance. *LeRoy vs. Beard*, 8 How.

(U. S.) 451; *Peters v. Farnsworth*, 15 Vt. 155, *post p.* 387; *Vanada vs. Hopkins*, 1 J. J. Marsh, 293; *Taggart vs. Stanberry*, 2 McLean, 543; Rawle on Cov. § 20, note."

(15 VERMONT, 155, 40 AM. DEC. 671.)

PETERS vs. FARNSWORTH.

(Supreme Court of Vermont, January, 1843.)

Case. Defendant, acting as attorney of Cadwallader and Astley, conveyed to plaintiff a certain lot of land, with covenants of warranty and seizin. Subsequently plaintiff was evicted by title paramount. He now brought an action on the case, alleging in his declaration that defendant had falsely represented himself as possessed of authority to bind Cadwallader and Astley by deed with covenants of warranty, and thereby deceived and misled him. Defendant introduced in evidence, after plaintiff had rested, the power of attorney under which he acted. The operative clause will be found set forth at large in the opinion. The court below was of the opinion that the power of attorney was insufficient to authorize the execution of the deed with covenants of warranty. Plaintiff had a verdict.

H. R. & J. J. Beardsley, for the defendants.

Smalley and *Adams, contra.*

By the court, WILLIAMS, C. J. Exceptions were taken to the decision of the county court by both plaintiff and defendant. The exception taken by the plaintiff is to the rule of damages laid down by the court. Those taken by the defendant involve the inquiry whether the plaintiff can maintain any action against the defendant on the facts appearing in the case; and this depends on the construction to be given to the letter of attorney from Cadwallader and Astley to the defendant, for if that letter of attorney authorized him to execute the conveyance to the plaintiff, with the covenant of warranty, the suit of the plaintiff fails.

In certain sales of personal property, the agent who is empowered to sell, is authorized to give a warranty of the soundness of the article sold, on the ground, as was said by Lord ELLENBOROUGH, *Alexander vs. Gibson*, 2 Camp. 555, that, as it is now usual, on the sale of horses, to require a warranty, the agent may fairly be pre-

sumed to be acting within the scope of his authority. Were we without the authority of any adjudged case upon the subject, I should strongly incline to the opinion, that, inasmuch as it is usual and customary to insert covenants in most deeds of conveyance, more or less restricted, as the interest of grantor may require, a letter of attorney, authorizing any one to sell, and to execute deeds or assurances, would authorize the inserting in the deed or assurance any such reasonable covenants as are usual in such deeds, limited only by the discretion of the attorney. And it appears to me that such a principle was recognized in the case of *Wilson vs. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458, where it was holden, that under a power to mortgage, the agent was authorized to insert a power to sell, on default of payment. It is true, it was holden in the case of *Coles vs. Kinder*, Cro. Jac. 571, that on a promise to make reasonable assurance of land, the defendant was not bound to execute a conveyance with ordinary and reasonable covenants; but in the case of *Laffels vs. Catterton*, reported in 1 Mod. 67, and in Raym. 190, it was said by Twisden that the law is altered since the Coles and Kinder case, as to covenants in a conveyance if they be reasonable.

It appears to me it would but be extending the principle of the latter case to the present, to say that, under a promise, or under a power of attorney to sell and deed, a deed with a covenant to secure the title, such as is usual, should be required. The court of appeals in Kentucky have decided that a power to sell lands includes an authority to convey with covenants of general warranty. *Vanada vs. Hopkins*, 1 J. J. Marsh, 293, 19 Am. Dec. 92. The case of *Nixon vs. Hyserott*, 5 Johns. (N. Y.), 58, is, however, opposed to this view; and the authority of the latter case is recognized both in 7 and 12 Johns. and 2 Cowen. Upon this subject it is very desirable that the law should be considered the same in the different states. In the case of *Nixon vs. Hyserott*, it is to be observed that the letter of attorney authorized the attorney "to grant, bargain, sell, release, convey and confirm in fee," to any person, certain specified lots, and that these are the operative words made use of in the granting part of a deed, and had no reference to the species of conveyance which the attorney might adopt. The further words, "to execute," etc., "such conveyances, assurances," etc., neither enlarged, extended, nor limited the authority first given, but only left it to the attorney to adopt such conveyance as, in his judgment, might be needful to transfer the title. The letter of

attorney gave no other authority, except to sell and execute such deeds as the attorney might think necessary to effectuate the sale. It was so treated in the cases of *Gibson vs. Colt*, 7 Johns. (N. Y.), 390, and in *Van Eps vs. Schenectady*, 12 Id. 436, 7 Am. Dec. 330, where the case was mentioned.

In the case before us, the letter of attorney to the defendant authorized him to do all that was necessary in relation to certain tracts of land in Bakersfield and Fairfax to obtain possession, and to "sell for the best prices, either by public auction or private contract, as he might think most advantageous. And upon sale thereof, or any part thereof, and on receipt of the money arising from such sale or sales, to give sufficient releases, acquittances, and discharges for the same, and to sign, seal, and execute all or any such contracts, agreements, conveyances and assurances, and to do and perform all such acts and things for perfecting such sale or sales thereof, or any part thereof, as shall be requisite and necessary in that behalf." Under this letter of attorney he was bound to make such contracts as would be most advantageous to his principals, and to obtain the best prices, and was authorized to make such contracts or agreements—which if under seal would be covenants—as were requisite; and could bind his principals thereby. He could bind them to make a good title by warranty deed, or otherwise. The authority was plenary to bind the principals by a contract, covenant or agreement, to secure the title to the purchaser, and he could execute a deed, conveyance or assurance, with such covenants as were necessary to procure the best prices and most advantageous terms of sale. We think, therefore, that under this letter of attorney he was fully authorized to execute the deed to the plaintiff with the covenants therein contained, and by such covenants Cadwallader and Astley were obligated to assure the title, and the defendant did not exceed his authority and was not liable in this action.

The judgment of the county court is reversed.

NOTE.—See *Kroeger vs. Pitcairn, post*, p. —; *Simmons vs. More, post*, p. —.

(5 HEISKELL, 555.)

LUMPKIN vs. WILSON.

(Supreme Court of Tennessee. June, 1871.)

Bill in chancery by Lumpkin to have perfected his title to a lot of ground bought by him of one James Wilson, an agent of the owners, Mrs. Keene and Mrs. Talbot. There was a cross-bill to set aside the conveyance.

Humes, Poston & Webb, for complainant.
Estes & Jackson, for defendants.

SNEED, J. (After stating the facts.) In his original bill complainant states that the interests of Mrs. Keene and Mrs. Talbot in the lot were paid for by selling and delivering to James Wilson a stock of goods, wares and merchandise, and in his answer to the cross-bill, he repeats the substance of his original bill. The first question presented on these facts is, whether the power of attorney authorized the agent to convey the lot for goods, wares and merchandise? And the answer to this depends upon the question, whether he was thereby constituted a general or a special agent. The power conferred was, "to bargain, sell, alien, enfeoff, transfer, and convey, by deed in fee simple," etc., and "to do and perform any and all acts and deeds necessary to be done, in and about the premises." The agency was clearly special. It was confined to selling and conveying the lot. There were no directions or instructions beyond the selling and conveying, and the doing of such things as might be necessary to carry out the power. Under this power the agent had no right to sell and convey for any other consideration than for money. *Harrold vs. Gillespie,* 7 Humph. (Tenn.) 57; *Baldwin vs. Merrill,* 8 Id. 132; *Kenny vs. Hazeltine,* 6 Id. 62.

The agency being special, the power is to be strictly construed. This is the settled rule in the construction of powers of attorney, and the principal cannot be bound beyond the limits prescribed by himself. *Bank of Mobile vs. Andrews,* 2 Sneed, (Tenn.) 540.

The distinction between a general and special agent is laid down with clearness by Judge KENT, Com. vol. 2, 806. He says: "The special authority must be strictly pursued. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power."

In the case before us, the complainant says he examined carefully the power of attorney, and had it examined by his legal adviser, and that he made the purchase upon his own judgment and that of his legal adviser that the agent had power to sell the lot for goods, wares and merchandise. He acted at his own peril, and got no title to the lot, unless the act of the agent was afterwards ratified and confirmed by the principal. * * * (The court further held that no ratification had been shown.)

Complainant's bill dismissed, and decree for complainants in the cross-bill.

NOTE.—That power to sell land confers no power to sell on credit, see, also, *School District vs. Ætna Insurance Co., ante*, p. 194.

II.

OF AGENT AUTHORIZED TO SELL PERSONAL PROPERTY.

(58 MARYLAND 305, 42 AM. REP. 332.)

LEVI vs. BOOTH.

(Court of Appeals of Maryland, April, 1882.)

TROVER. The opinion states the case. The plaintiff had judgment below.

Robert D. Morrison, for appellants.

Geo. Hawkins Williams, for appellee.

ALVEY, J. In this case it appears that the plaintiff was the owner of a valuable diamond ring, and he placed it in the hands and possession of a party by the name of De Wolff, a dealer and trader in jewelry, for the purpose of obtaining a match for it, or failing in that to get an offer for it; and there is nothing in the proof to show that it was given into the possession of De Wolff for any other purpose, or that he was in any manner authorized to sell it.

The defendants were pawnbrokers and dealt in articles of jewelry. De Wolff dealt with them and made purchases on credit, and settled from time to time; and among the articles of jewelry, he purchased diamond rings, earrings, studs, watches, etc., and became considerably indebted to the defendants. He appears to have been a sort of

street peddler of articles of jewelry—going from place to place and disposing of his articles on the best terms he could make. He had no shop or established place of business.

On the part of the defendants the evidence tended to show that DeWolff sold the ring to Henry Levi, one of the defendants, for a certain price—part paid in cash and the other part in goods. But on the part of the plaintiff, proof was given that before such alleged sale, Henry Levi had been informed that the ring belonged to the plaintiff, and that DeWolff had no power or authority to sell it. DeWolff, as witness, proved that he left the ring with Henry Levi to obtain an offer for it, but with no authority to sell it; while on the other hand, Henry Levi testified that he purchased the ring of DeWolff, supposing him to have been the real owner of it. It was also proved by the admission and statement of Henry Levi, when demand was made of the defendants by the plaintiff for the ring, that the ring had been sold to some person whose name he did not know or could not furnish.

The plaintiff brought his action in trover for the conversion of the ring, and recovered a verdict and judgment for the supposed value thereof.

At the trial, upon the evidence offered, the plaintiff submitted two prayers for instruction to the jury, and they were both granted, and the defendants submitted six prayers, all of which were refused; and to the ruling of the court in respect to these several prayers the defendants excepted.

Upon these prayers thus submitted, three principal questions are presented:

1. Supposing it to be true, as contended by the defendants, that DeWolff did sell the ring to Henry Levi, one of the defendants, as if he were the owner thereof, when in fact he was not the owner, and had no express authority to sell it, whether under the facts disclosed in the evidence, such sale was good and effective at the common law as between the defendants and the real owner?

2. If not, whether such sale was good and effective in view of the facts disclosed, as between the real owner of the ring and the defendants under the provisions of what is known as the Factor's Act, Code, art. 3, § 4?

3. If neither of the defendants acquired title to the ring, whether under the facts of the case, there was such conversion thereof by the defendants, or one of them, as would entitle the plaintiff to recover?

1. It is certainly a well-established principle of the common law, founded as it would seem upon a maxim of the civil law, *nemo plus juris in alium transferre potest quam ipse habet,* that a sale by a person who has no right or power to sell is not effective as against the rightful owner. Sales made in market overt were an exception to this general rule; but the old Saxon institution of market overt has never been recognized in this state, nor, as far as we are informed, in any of the United States. *Browning vs. Magill,* 2 H. & J. 308; *Mowrey vs. Walsh,* 8 Cow. 238; *Dame vs. Baldwin,* 8 Mass. 518; *Ventress vs. Smith,* 10 Pet. 175.

At common law, therefore, a person in possession of goods cannot confer upon another, either by sale or pledge, any other or better title to the goods than he himself has. To this general rule there is an apparent exception in favor of *bona fide* purchasers or pledgees, where the party in possession making the sale or pledge has a title defeasible on account of fraud, or by reason of a condition in the contract of sale under which he holds. *Hall vs. Hinks,* 21 Md. 406; *Donaldson vs. Farwell,* 93 U. S. 631. Therefore, to make either a sale or pledge valid as against the real owner, where the sale or pledge is made by another person, it is incumbent upon the person claiming under such sale or pledge to show that the party making it had authority from the owner. *Cole vs. Northwestern Bank,* L. R., 10 C. P. 354, 363; *Johnson vs. Credit Lyonnais,* 2 C. P. Div. 224, affirmed on appeal, 3 Id. 32. If, however, the real owner of the goods has so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he will even by the common law be precluded from denying, as against those who may have acted *bona fide* on the faith of that apparent authority, that he had given such authority, and the result as to them is the same as if he had really given it; but it is, of course, otherwise in respect to those who may have acted with notice of the want or limitation of authority in point of fact.

This principle of estoppel, as applied to sales or pledges of goods or merchandise, is aptly and completely illustrated in the familiar and often cited case of *Pickering vs. Busk,* 15 East, 38. The case was decided before the passage of any of the English Factor Acts, and the facts were that the true owner had bought parcels of hemp through Swallow, who was a broker and an agent for sale. At the instance and request of the plaintiff, the real owner, the hemp was transferred on the books of the wharfinger from the name of the seller to that of Swallow, who without express authority from

the owner afterwards sold it. In an action of trover by the real owner, to recover for the conversion of the hemp thus sold, it was held that the transfer on the books of the wharfinger by the direction of the plaintiff to the name of Swallow authorized the latter to deal with the hemp as owner with respect to third persons, and that the plaintiff, who had thus enabled Swallow to assume the appearance of ownership to the world, should abide the consequences of his own act. Lord ELLENBOROUGH said: "It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look at the acts of the parties, and to the external indicia of property and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade it must be presumed that the apparent authority is the real authority." And in conclusion he said: "The sale was made by a person who had all the indicia of property; the hemp could only have been so transferred into his name for the purposes of sale, and the party who has transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name."

The same principle, though applied in a case quite different in its circumstances, was adopted by this court in the case of *Lister vs. Allen*, 31 Md. 543. And in the recent English cases of *Cole vs. Northwestern Bank*, L. R., 10 C. P. Ex. Ch. 354; *Johnson vs. The Credit Lyonnais*, 2 C. P. Div. 224, affirmed on appeal, 3 Id. 32; and *City Bank vs. Barrow*, 5 App. Cas. H. L. 664, the same principle with its proper limitations was fully expounded, both as it exists at the common law, independently of statute, and as it has been modified by what is known as the Factors' Acts; and those cases fully and clearly maintain the principles we have stated.

In this case there is no evidence that there was any express authority by the plaintiff to DeWolff to sell the ring, though there is evidence that DeWolff was authorized to procure an offer for it. This of course reserved to the plaintiff the right to accept or reject the offer if one was made. With this limitation of authority there can be no question of the principle propounded in the plaintiff's first prayer; for that goes upon the hypothesis that there was no sale in fact to Levi, but that the ring was simply left with the defendants, and that they afterwards without other authority sold it. If it be true that there was no sale to the defendants, or one

of them, and that they, simply having the possession and without authority for so doing, sold or disposed of the ring, it is clear they were wrongdoers, and therefore liable for the conversion. This was the theory and principle upon which the plaintiff's case appears to have been presented in the court below.

2. But on the part of the defendants the case was presented in a different aspect. According to the theory of the fourth, fifth and sixth prayers of the defendants, there was a sale by De Wolf to the defendants, or one of them, and the court was asked by the fourth and fifth prayers to instruct the jury that if they found that De Wolff was a dealer in jewelry, and with knowledge of that fact the plaintiff intrusted him or intrusted him as agent with the possession of the diamond ring, and thereby put it in his power to act as apparent owner thereof, and that the defendants acted upon the faith of such apparent ownership, and purchased the ring for value and without notice of the ownership of plaintiff, then the plaintiff could not recover.

The sixth prayer proposed to submit to the jury to find whether the ring had not been delivered or intrusted to De Wolff by the plaintiff, with authority to sell or dispose of it under certain limitations as to price. But, as we have already said, there was no evidence of such authority being delegated to De Wolff and the court therefore would not have been justified in submitting that question to the jury. That prayer, therefore, was properly refused.

But with respect to the propositions involved in the fourth and fifth prayers, other and different considerations are presented.

Independently of the provisions of the statute in regard to the dealings with agents and factors, it is very clear, upon the prineiciples that we have already stated, that the bare possession of goods by one, though he may happen to be a dealer in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as owner there must be some other indicia of property than mere possession. There must, as in the case of *Pickering vs. Busk, supra,* and more fully expounded and illustrated in *Johnson vs. The Credit Lyonnais, supra,* be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an inno-

cent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweler's establishment to be repaired, or cloth to a clothing establishment to be made into garments. If De Wolff, instead of being a mere peddler of jewelry, had occupied a shop where he carried on the business of a jeweler, and the ring had been left with him, either to be mended, or reset, or to be exposed to inspection in order to procure an offer for it, without any authority to sell it, we suppose it to be clear, that the owner could not have been divested of his property by an unauthorized sale by the jeweler under such circumstances. And if he could not be divested of his property by sale under such circumstances, we do not perceive how the present case could be distinguished, in principle, from that just stated. (Omitting the other questions.)

Upon the whole record we find no error in any of the rulings excepted to, and we must therefore affirm the judgment.

Judgment affirmed.

(105 NEW YORK, 283, 59 AM. REP. 502.)

SMITH vs. CLEWS.

(New York Court of Appeals, April, 1887.)

Action to recover personal property. The opinion states the case. The plaintiff had judgment below.

Albert A. Abbott, for appellant.

Charles H. Woodbury, for respondent.

PECKHAM, J. This is an action under the code to obtain the delivery of personal property alleged to belong to plaintiffs and to be wrongfully withheld by defendant. The plaintiffs had a verdict which was affirmed at General Term, and the defendant has appealed here. The plaintiffs claimed to be the owners of what they called a pair of diamond ear-knobs, of the value of $1,400, which came into the possession of defendant, as shown by the evidence in the following manner.

Elijah Miers was a dealer in diamonds in New York. His business was to procure diamonds from the larger dealers and sell them to his customers. Before the 13th of January, 1879, he had

procured from an authorized agent of the plaintiffs a pair of diamond ear-rings which on that day he had sold to the defendant for $300, and had received the check of defendant, payable to his order in payment therefor.

Before the 23d day of January, 1879, Miers had procured another pair of ear-rings from plaintiffs' said agent, and sold them on that day to defendant for $450, receiving in payment the first pair of ear-rings and the check of defendant for the balance of $150. Miers paid to plaintiffs' agent the price of these diamonds after the sale to defendant. The defendant had purchased them in good faith from Miers, assuming him to be the owner. He intended the first pair as a present for his wife, but when shown to her she preferred a more expensive pair, and hence the second purchase. These also proved unacceptable, and it was some time after their purchase by defendant before the diamonds in question were presented to him for purchase, he having in the meantime kept the second pair, and upon the purchase of the diamonds in question of the same man Miers, he gave back the second pair and paid $650 in addition, thus making $1,100, the purchase-price of these last diamonds.

There is no question of the *bona fides* of the series of purchases by the defendant. The evidence is uncontradicted as to the manner in which Miers obtained the last diamonds from the plaintiffs. They had delivered them to Plumb, the diamond broker, who had delivered the other diamonds to Miers. One of the plaintiffs was asked how it happened that he delivered these diamonds to Plumb, and he testified that he could not say whether it was at Miers' request or not, but that Miers had called on him before he delivered them to Plumb and had said to him that he had a customer for a pair of diamond ear-knobs, and although the plaintiff could not say that he told Miers that he would send him the diamonds through Plumb, yet he says he stated to Plumb that he would do so, and he did so, and authorized Plumb to deliver the diamonds to Miers and that that is the way Miers got them. The witness also said he knew Miers had the diamonds in his possession immediately, that they were taken from the plaintiffs' office and delivered to Miers by Plumb; they were delivered to Plumb on the 12th of April, and by him to Miers on that day. When Plumb delivered them to Miers he took from him a receipt in this form:

"NEW YORK, April 12, 1879.

"Received from Alfred H. Smith & Co. by their representative,

B. W. Plumb, a pair of single stone diamond earrings 10⅛ carats, of the value of fourteen hundred dollars, on approval to show to my customers, said knobs to be returned to said A. H. Smith & Co. on demand. "E. MIERS."

Having thus become possessed of the diamonds, Miers, as has been stated, sold them to defendant, and the question is, did he get a good title as against the plaintiffs?

Taking the undisputed evidence and reading this receipt in the light thereof, we cannot resist the conclusion that the plaintiffs conferred upon Miers the power to sell these diamonds and of course to give a good title, and therefore the court should have directed a verdict for the defendant.

The plaintiffs were dealers in diamonds and they knew Miers and that he was engaged in the business of a diamond dealer—a seller of the stones to whomever he chose.

They had on two former occasions intrusted, through their agent, diamonds to Miers, who had sold them and accounted for the proceeds of the sale without any fault being found so far as appears on account of any lack of authority to sell.

They were informed by Miers on this particular occasion, that he had a customer for a pair of diamond ear-rings, and these diamonds were then intrusted to Miers by the plaintiffs, through their agent, Plumb. Upon taking them, Miers gave the receipt spoken of. Now, upon these facts, what other meaning can be attached to that receipt than that Miers had power to take these diamonds, show them to his customer, and if approved of by the customer, sell them to him? The fact that Miers agreed to return them to plaintiffs on demand, must be construed with reference to the obvious purpose for which the diamonds were intrusted to him, viz.: that of a sale; and so construed, the plain meaning is that if not already sold, the plaintiffs had the right to demand the return of the diamonds any time, and Miers would then be bound to return them. The information given to plaintiffs, by Miers, that he (Miers), had a customer for a pair of diamond ear-knobs, is susceptible of no other interpretation than that he had a customer who wanted to buy a pair. Under such circumstances, what could a dealer in diamonds mean by intrusting them to another dealer who had a customer who wanted to buy them, and who came to this dealer for the purpose of being supplied by him with diamonds of a kind which his customer wanted to buy?

Enlightened by these facts, the interpretation of the receipt

signed by Miers is an easy matter. It can mean nothing else than an authority to sell the stones to the customer if they met his approval, and if not actually sold before demand made, they should be returned to the plaintiffs upon such demand.

This conclusion as to what was the actual authority given to Miers does not in the least affect the propriety of the decisions cited by the counsel for the respondents and in the opinion of the court at General Term, to the effect that one intrusted simply with the possession of personal property, with no power to sell or pass title, cannot give title to the property even to a *bona fide* purchaser for value. The question here is simply what was the authority with which the man Miers was clothed, and upon the undisputed evidence in the case, we hold it was an authority to sell.

The judgment of the General Term and of the circuit should be reversed, and a new trial ordered, costs to abide the event.

All concur. Judgment reversed.

NOTE.—See, also, *Towle vs. Leavitt*, *ante*, p. 358.

(55 WISCONSIN 515, 42 AM. REP. 740.)

McKINDLY vs. DUNHAM.

(Supreme Court of Wisconsin, August, 1882.)

Action for price of goods. The opinion states the facts. The defendant had judgment below.

Geo. D. Waring and *T. C. Ryan*, for appellant.

W. W. D. Turner, for respondent.

ORTON, J. A short time before August 11, 1879, one W. L. Kilbourn called upon the defendant at Berlin, Wisconsin, exhibited the cards of the plaintiffs' house in Chicago, and solicited and obtained from the defendant an order for 1,000 cigars of a certain brand upon, and sent the same to, the plaintiffs, and the plaintiffs on that day shipped the cigars and sent the bill thereof ($30 at sixty days) to, and they were duly received by, the defendant. About thirty days thereafter the said Kilbourn called upon the said defendant and asked him "if he would just as soon pay him for those cigars as not," and the defendant replied "that he would as soon pay it then as any other time," and paid the same, and said Kilbourn receipted the original bill produced by the defend-

ant in the firm name of the plaintiffs by himself. Kilbourn's real authority as agent of the plaintiffs was to solicit from country merchants orders on them for goods, and if such orders were accepted and filled, Kilbourn was entitled to a small commission thereon. We have no evidence of what the terms of this order were, and are left to presume that it was a mere order or request by the defendant to the plaintiffs for 1,000 cigars, and perhaps at a certain price. The main question in the case is the authority of Kilbourn to receive payment of this bill.

There is no proof of numerous or indeed of any other acts done by this agent of this character, with the express or tacit consent of the plaintiffs, or of any general habit of dealing, or of any other transaction between these parties of any kind, or that the real scope of his authority beyond what appeared was disclosed at this time. There is nothing besides this one transaction from which his authority and the full scope of his authority can be implied or inferred. It is his apparent or ostensible authority in this one act to do another act of the same kind, and nothing more.

The only question here is, what was his apparent or ostensible authority in this one act? "His implied agency cannot be construed to extend beyond the obvious purposes for which it was apparently created." "The intention of the parties, deduced from the nature and circumstances of this particular case, constitutes the true ground of exposition of the extent of his authority." Story on Agency, § 87; *Wright vs. Hood*, 49 Wis. 235. A principal is responsible for any act of his agent which justifies a party dealing with him in believing that he has given the agent his authority to do such act (1 Pars. on Con. 44; *Kasson vs. Noltner*, 43 Wis. 637); or as Pothier says, "if the agent does not exceed the power with which he was ostensibly invested." This agent did not appear or pretend to have any other authority from the plaintiffs than to solicit orders for goods, and send them to the plaintiffs. This is all he did in this case, and all he pretended he had authority to do. In this case he could not possibly do his principal any harm.

To this extent they authorized him and trusted him; but they might not have been willing to trust him further with the large and dangerous power of receiving payments, and they did not, so far as is possible to infer from this transaction.

But it is said by the learned counsel of the respondent the agent Kilbourn sold the goods to the defendant, and in this power to sell is implied the further power to receive the consideration or

payment therefor, and the learned judge of the circuit court in effect so charged the jury, as follows: "Presumptively, Mr. Dunham had the right to pay this bill to the person from whom he purchased the goods" (meaning Kilbourn the agent); and again: "The plaintiffs sending the goods to Dunham upon that sale or order, presumptively Kilbourn had the right to collect that debt."

If what Kilbourn did could properly be called a sale of the goods, even then this instruction is questionable as an abstract statement of the law; for it does not always, as a general rule, follow that the power to collect the moneys upon them is included in the power of an agent to make contracts for his principal. Story on Ag. § 98; *Higgins vs. Moore,* 34 N. Y. 417; *Mynn vs. Joliffe,* 1 Moody & R. 326.

But the agent did not sell the goods or even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by anything then done.

The order of the defendant was a mere proposal, to be accepted or not, as the plaintiffs might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium.* Benj. on Sales, §§ 40, 70; *Johnson vs. Filkington,* 39 Wis. 62. Even as a broker (and he was less rather than more in the authority he exercised in this instance), he need not even see to the delivery of the goods (Story on Sales, § 85); and if his negotiation had been broken off, and the contract not finally completed, he would not be entitled to his commissisons. Story on Sales, § 86. As is said in *Higgins vs. Moore, supra,* "The duty of a broker, in general, is ended when he has found a purchaser, and has brought the parties together. He is a mere negotiator or middleman between the seller and purchaser." It is only in cases where the broker has possession of the goods that he can sell, and in that case, even, if he parts with the securities he receives on the sale to his principal, his implied authority to receive payment, if he had any, ceases with their possession. *Strachan vs. Muxlow,* 24 Wis. 1. Aside from the clear and obvious reason from the general principles of bargain and sale, and principal and agent, why Kilbourn was not author-

ized to receive payment as the agent of the plaintiffs in this case, the four following cases, all of them closely analogous, and two of them precisely parallel, are abundant authority: *Baring vs. Corrie*, 2 B. & Ald. 137; *Higgins vs. Moore, supra*; *Kornemann vs. Monaghan*, 24 Mich. 36; *Clark vs. Smith*, 88 Ill. 298.

It follows, therefore, that so far the circuit court committed two flagrant errors: First, in ruling and instructing the jury that Kilbourn, as agent of the plaintiffs, made a sale of the goods to the defendant, and was authorized so to do; and, secondly, that if he did sell the goods, he had therefore authority to receive payment therefor. We omit to consider, whether admitting both these propositions, he could have received payment before it was due according to the terms of the assumed sale, or whether the fact of his proposing payment so long before due did not cast suspicion upon his act, especially as he had not been intrusted with the bill of the goods even, and did not pretend that he had authority to receive payment; leaving to the defendant the mere voluntary act of payment, in answer to the request, "If he would just as soon pay him for those cigars as not."

We have so far treated the case as if nothing else appeared on the face of the bill of goods or figured in the transaction, for this is the most favorable treatment of the case for the defendant. We might omit entirely this other element in the case, if it were not passing over evidence of authority in the agent to receive payment in this particular case, by construction or presumption, and silently sanctioning a judicial practice which we cannot approve. On the face of the bill sent to the defendant, and directly under his address, there appears in large, legible print, in red ink, as if stamped upon it, the words, "Agents not authorized to collect." Through these words, lengthwise, appears drawn a pen line in dark ink as an erasure. The positive testimony of one of the plaintiffs, at least, is that such erasure was not there when the bill was sent to the defendant. The testimony of the defendant and in his behalf was only that it was there when the bill was paid, and that neither the words nor the erasure were observed when it was received.

It might well be said that there was no contradiction of the testimony of the plaintiffs that the erasure was not made before the bill was sent to the defendant, and that such fact was at least *prima facie* established. Even on that hypothesis, the Circuit Court refused to instruct the jury, as requested by the counsel of the

appellant, that these words were notice to the defendant whether he saw them or not. We think this was clearly erroneous. If these words, so legible and prominent on the face of the bill, would not be notice, it would seem to be impossible to give a purchaser such a notice. By all authorities he must be presumed to have observed these words, and to have had such notice, when they were so prominent on the face of a bill of goods in his possession, and in which he alone was interested as purchaser. It might as well be said that the contents of any written or printed notice of any kind, or for any purpose, were not presumed to have been brought home to and to be known by a party on his receipt of the notice. It is the law, and ought to have been given as asked, and not left to the problematical finding of the jury. *Mamlock vs. Fairbanks*, 46 Wis. 415. (Omitting a minor point).

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

NOTE.—See, also, *Putnam vs. French*, 53 Vt. 402, 38 Am. Rep. 682; *Trainor vs. Morrison*, 78 Me. 160, 57 Am. Rep. 790.

(75 WISCONSIN, 619.)

HIBBARD vs. PEEK

(Supreme Court of Wisconsin, January, 1890.)

Action by Hibbard, Spencer & Bartlett against George W. Peek, to recover for goods sold and delivered.

Miles & Shea, for appellant.

Tomkins, Merrill & Smith, for appellee.

COLE, C. J. * * * The real contest in the case is upon the counter-claim or offset of the defendant for commissions. The facts on which the counter-claim arises are stated by the defendant in his testimony substantially as follows: "Benrett [the plaintiff's salesman] came to my store at Ashland, and asked if I wanted some goods. I told him I thought so; I would look around. I asked him how he would like to take a stock order. He said, 'That is what I would like,' and said: 'Where is it?' I said I wanted something for it. I generally charge for information that is valu-

able. He wanted to know what I wanted, and I told him five per cent. on the amount. He asked me who it was, and I said: 'You give me five per cent. and I will tell you. He said he did not know about it; that he would take a little while, and go over to Garnich's. He went into Garnich's, and came back, and said he knew who that party was, and said it was Nelson. I said, 'That is right, but,' I said, 'it won't do you any good,' as I was positive he could not get the order without me; and he said: 'I will give you five per cent. Give me the order.' I dictated an order, and told Bennet to deliver it to Nelson." It appears that Bennet took this order or letter, and went to Washburn, and sold a bill of goods, amounting to $2,300 or $2,400, to Nelson. Nelson testified, in effect, that he did not buy on the defendant's credit, and that the only influence that the defendant's letter had upon him was that the defendant recommended the firm, and that he bought on that ground; that he knew the house before, and that it had been recommended to him by half a dozen other men; that he probably should have bought the same stock if the defendant had not sent the letter.

Now, upon these facts, is there any ground for holding that there was a valid contract entered into between Bennet and the defendant to pay the 5 per cent. commissions on the bill of goods sold Nelson? There is surely no ground for claiming that Bennet had any authority from the plaintiff to give such commissions for any aid or information which the defendant might give or render in making the sale. The secretary of the plaintiff corporation testifies distinctly and positively that the agent who sold the goods to the defendant had no authority to promise the defendant a commission on goods sold to other people, or to Nelson, and that such promise, if ever made, was never ratified or confirmed so as to make it binding on the principal. Indeed, the evidence is perfectly satisfactory and conclusive that the plaintiff never gave its traveling salesmen any authority whatever to grant commissions, or even credits, on goods sold by them. It is clear, therefore, that Bennet had no express authority to bind his principal to pay the defendant commissions on goods sold Nelson, even if such a contract were made.

Had he an implied authority, growing out of the usage or custom in the hardware trade to render his principal liable for such commissions? On this point, depositions were taken of a number of traveling salesmen, representing hardware houses in Detroit, Chicago and Milwaukee, who testified that it was customary for travel-

ing men, in that line of business, to agree to pay, and to pay, commissions to third parties for procuring orders, and that such contracts were sanctioned by the different houses which they represented. But there was considerable countervailing proof on this question of custom; and the circuit court held that the alleged custom, especially in Chicago and Ashland, was not sufficiently established to warrant submitting the case to the jury on the alleged usage. On that point, we think, the learned circuit court was clearly right. We do not think there was any proof given of a custom or usage in the hardware trade of traveling salesmen paying such commissions, or agreeing to pay them, which was sufficiently long-continued and uniform so that the court would be justified in assuming that the parties contracted with reference to it, or that the salesman had authority to bind his principal to pay such commissions by reason of its existence. The practice of a considerable number of houses in the hardware trade of giving their traveling salesmen authority to pay such commissions would not warrant a court in presuming that agents generally had such authority who were sent out by hardware houses to sell their goods.

The authority of an agent in any given case is incident to the character bestowed upon him by the principal. If the principal has, by his express act, or as the logical result of his words or conduct, impressed upon the agent the character of one authorized to act and speak for him in a given capacity, authority so to speak and act follows as a necessary incident of the character, and the principal, having conferred the character, will not be heard to assert, as against third parties who have relied thereon in good faith, that he did not intend to impose so much authority, or that he had given the agent express directions not to exercise it; and where the principal confers upon the agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly-known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage. Mechem, Ag. §§ 278, 281; Whart. Ag. §§ 134, 676, 696. The usage of a particular trade or business, or a particular class of agents, may be shown, not for the purpose of enlarging the powers of the agent employed therein, but for the purpose of interpreting those powers which are actually given; for the means ordinarily used to execute the authority are included in the power,

and may be resorted to by all agents, and especially by commercial agents. Story, Ag. § 77.

But the evidence of the usage, in a case like this, should be clear and satisfactory, and should show that the usage has so long continued, and has been so uniform, that merchants in that kind of business may be presumed to authorize their agents to sell their goods in the ordinary way in which such goods are sold, and in reference to such custom. The evidence, in the present case, falls far short of establishing the usage or custom in the hardware business of traveling salesmen making contracts on behalf of their principals to pay commissions to third parties for aid in procuring orders from those to whom goods are sold. It is quite clear that the defendant's recommendation sent to Nelson, did not have any influence upon the latter in inducing him to make the purchase he did; but, had the fact been otherwise, we do not think the plaintiff was bound, by the contract of Bennet, to pay the defendant the commissions he claims, as it was beyond the scope of his authority to make such a contract. It follows from these views that the judgment of the circuit court must be affirmed.

NOTE.—See, also, *Adams vs. Pittsburgh Ins. Co.* 95 Penn. St. 348, 40 Am. Rep. 663; *Day vs. Holmes*, 103 Mass. 306; *Daylight Burner Co. vs. Odlin*, 51 N. H. 56, 12 Am. Rep. 45; *Randall vs. Kehlor*, 60 Me. 37; *Upton vs. Suffolk County Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163: *Pickert vs. Marston, post.* p. 411.

(80 MAINE, 496.)

BILLINGS, TAYLOR & COMPANY vs. MASON.

(Supreme Judicial Court of Maine, August, 1888.)

The opinion states the facts.

Wiswell, King & Peters, for plaintiff.

Hale & Hamlin, for defendants.

DANFORTH, J. In this action no material facts are in dispute. The court, allowing certain alleged payments, directed a verdict for the balance, to which order the plaintiff excepts, on the ground that no part of such payment should be allowed.

The action is assumpsit upon an account annexed. The defendant admits that he received from the plaintiff the goods charged and makes no question as to the prices. This makes a *prima facie* case against him, and though technically it does not change the burden of proof, it devolves upon him, if he would avoid this responsibility, to give some reason why.

The explanation offered by the defendant is that, though he received the goods from the plaintiff, he received them by virtue of an express agreement with an agent or traveling salesman of the plaintiff, one element of which was that certain goods, of a like kind which the defendant then had should be taken in payment. This agreement with the agent is not questioned, but the answer to it is two-fold; first, that the agent had no authority to make such a contract, and secondly that the contract under which the action is sought to be maintained was made directly with the plaintiff, though in some degree through the instrumentality of the agent.

Assuming under the first that the agent had no authority to make the contract he did, and the evidence is quite conclusive upon that point, still it does not change the conceded fact that he not only assumed the authority to do so, but did actually make such a contract. Waiving for the moment the second point raised, this was the only contract having the assent of the defendant, the contract under which he acted and by virtue of which he obtained the goods. It is quite clear that the plaintiff cannot hold him upon a contract he did not make or repudiate the contract in part and hold the remainder valid. *Brigham vs. Palmer*, 3 Allen, 450–452. Nor can he be holden upon an implied contract, for that is excluded by the express.

The second point relied upon by the plaintiff must fall with the first. True, the order for the goods was sent to the principal, presumably by the agent, with the consent of the defendant. But as to the nature of the order received there is a singular absence of testimony, though we have the evidence of the plaintiff's business manager. Whether it was accompanied with a statement of the contract it does not appear. It is certain the agent had no authority to send any other, and by no other would the defendant be bound. He had a right to suppose that the plaintiff's own agent would send the order correctly, and that when he received the goods they were sent according to the contract. If such were the case, the contract of the agent would be affirmed by the principal, in sending the goods. If such were not the case, the defendant would certainly

be no more bound than the plaintiff, who first gave credit to the agent.

This case differs materially from that of *Clough vs. Whitcomb*, 105 Mass. 482, in which an order in writing signed by the defendant, was sent to the plaintiff; nor is it like that of *Finch vs. Mansfield*, 97 Mass. 89, in which the agent did nothing more than solicit an order and forward it as received for the action of his principal. But in the principle involved this case is like that of *Wilson vs. Stratton*, 47 Maine, 120, in which the agent assumed to make the contract of sale with some conditions, and it was held that the contract was not completed until the conditions were complied with.

It is not, however, now a question as to the validity of the contract made, but what was that to which the defendant assented. He can be held to that and to no other. In any view we can take of the case there seems to be no doubt as to the terms of the agreement to which his assent was given. If that was a valid contract the ruling was clearly correct. If it was not, the ruling was more favorable to the plaintiff than it was entitled to in this form of action. In either case the exceptions must be overruled.

(90 NORTH CAROLINA, 101, 47 AM. REP. 516.)

HUNTLEY vs. MATHIAS.

(Supreme Court of North Carolina, February, 1884.)

Action of damages for over-driving a horse hired by a traveling agent of the defendant. The opinion states the point. The plaintiff had judgment below.

Little and *Parsons* and *Haywood & Haywood*, for plaintiff.

J. A. Lockhart and *S. T. Ashe*, for defendants.

MERRIMON, J. In the absence of any written instrument, agencies in many cases arise from verbal authorizations, from implications, from the nature of the business to be done, or from the general usages of trade and commerce.

It is a general principle, applicable in all such cases, whether the agency be general or special, unless the inference is especially negatived by some fact or circumstance, that it includes the authority to

employ all the usual modes and means of accomplishing the purposes and ends of the agency, and a slight deviation by the agent from the course of his duty will not vitiate his act, if this be immaterial or circumstantial only, and does not, in substance, exceed his power and duty. Such an agency carries with and includes in it, as an incident, all the powers which are necessary, proper, usual and reasonable, as means to effectuate the purposes for which it was created, and it makes no difference whether the authority is general or special, expressed or implied, it embraces all the appropriate means to accomplish the end to be attained.

The nature and extent of the incidental authority, in such cases, turn oftentimes upon very nice considerations of actual usage, or implications of law, and it is sometimes difficult to apply the true rule. Incidental powers are generally derived from the nature and purposes of the particular agency, or from the particular business or employment, or from the character of the agent himself. Sometimes the powers are determined by mere inference of law; in other cases by matter of fact; in others by inference of fact and in others still to determine them becomes a question of mixed law and fact. Story on Agency, §§ 85, 97, 100; *Gilbraith vs. Lineberger*, 69 N. C. 145; *Katzenstein vs. Railroad*, 84 Id. 688; *Bank vs. Bank*, 75 Id. 534; *Williams vs. Windley*, 86 Id. 107; 1 Wait Act. & Def. 221, 230.

In the case before us the allegations of the complaint are very general and the evidence is meagre, but applying the rules of law above stated to the whole case, we think the court properly held that there was evidence to go to the jury in respect to the authority of the agent to hire the horse.

It is alleged in the complaint that Mathias was the agent of the defendant corporation, and this is admitted in the answer, and the evidence went to show that the object of the agency was, that the agent should travel about the country, from place to place, and sell steam engines for his principal. Now, common experience and observation show, that generally, a man, whether as principal or agent, going about the country from place to place, and in various directions, to sell steam engines or merchandise of any kind that people generally purchase, does not go on foot, but on railroads when he can, on horseback, or in light, convenient vehicles. This is done almost uniformly, with a view to expedition as well as the reasonable comfort of the person traveling. In the general order of things this is done, and it is reasonable and

proper that it should be. And ordinarily, where an agent is sent out on such service, his principal furnishes the means of transportation. This is not, perhaps, uniformly, but it is generally so, and if there is not a legal presumption of authority in the agent to hire a horse or vehicle for the purpose of getting from place to place, the fact certainly raises the ground for an inference of fact to that effect, to be drawn by the jury.

The nature of the agency in this case rendered it necessary that the agent should from time to time have a horse to enable him to get from one place to another, and this gives rise to the inference that his employer gave him authority to hire one. The corporation defendant sent its agent out to travel from place to place to sell its goods, and it gave him credit as a trustworthy man in and about the business of the agency. In view of the habits of men, the customary course of business, especially the custom in such agencies as that under consideration, there arose the ground for an inference that the jury might properly draw, not conclusive in itself, but to be made and weighed by the jury, to the effect that the agent Mathias had authority to hire the horse for the purpose of his agency. *Katzenstein vs. Railroad, supra; Bank vs. Bank, supra; Bentley vs. Doggett*, 51 Wis. 224, s. c. 37 Am. Rep. 827. That the principal is liable to third persons for torts, deceits, frauds, malfeasance and non-feasance and omissions of duty of his agent in the course of his employment, cannot be questioned, even though the principal did not authorize, justify or participate in or know of such misconduct. Story on Agency, 452 *et seq.; Jones vs. Glass*, 13 Ired. 305; *Cox vs. Hoffman*, 4 Dev. & Bat. 180 (*ante*, p. 39).

The evidence in this case tended to show, and the jury found, that the agent hired the horse in the course of the business of his agency, and for the benefit of his principal, and while he had possession of and used the horse in the course of his business he negligently and carelessly drove him too rapidly, or otherwise maltreated him, whereby he was seriously injured to the damage of the plaintiff. The court fairly left the question of authority in the agent to hire the horse, and the character and extent of the injury to him to the jury, and we cannot see that the defendant has any just ground of complaint.

There is no error, and the judgment must be affirmed.

No error.

(68 WISCONSIN, 465, 60 AM. REP. 876.)

PICKERT vs. MARSTON.

(Supreme Court of Wisconsin, January, 1887.)

Action on account for goods. Defense, breach of warranty of other goods. The opinion states the facts. The defendant had judgment below.

Bleekman, Tourtellote & Bloomingdale, for appellant.

C. L. Hood, for respondents.

CASSODAY, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston, and worthless when they reached the defendants at LaCrosse. The defendants made the contract of purchase at LaCrosse with the plaintiff's traveling salesman, who resided at Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also, that by the terms of the contract, the fish ordered were guaranteed by the traveling salesman to reach the defendant in LaCrosse in good merchantable condition. The evidence on the part of the plaintiff was to the effect that the traveling salesman had no authority to make such guaranty, nor any assurance as to the condition in which the fish should be on reaching LaCrosse; and that he so informed the defendants about a month prior to the taking of the order in question.

The issue made does not arise between the principal and agent, but between the principal and the defendants who made the contract of purchase with the agent. The agency and the right to contract for the sale are admitted. But the authority to make the guaranty or warranty is denied. Beyond question, an agent may bind his principal if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principal to the contrary. *Putnam vs. French,* 53 Vt. 402, 38 Am. Rep. 682; *Bentley vs. Doggett,* 51 Wis. 224, 27 Am. Rep. 827; *Bouck vs. Enos,* 61 Wis. 664. Assuming that the traveling salesman had no actual authority to make such guaranty or warranty of the fish, then it became important to determine whether his authority to sell or contract for the sale clothed him with an implied authority to make such guaranty or warranty. "The general rule is, as to all contracts, including sales," said a

late learned author, "that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." 2 Benj. Sales, (4th Am. ed.) § 945, p. 824. The text is supported by the citation of numerous authorities. See *Bayliffe vs. Butterworth*, 1 Exch. 425; *Graves vs. Legg*, 2 Hurl. & N. 210; *Dingle vs. Hare*, 97 Eng. Com. L. 145; *Upton vs. Suffolk Mills*, 11 Cush. (Mass.) 586, 59 Am. Dec. 163; *Herring vs. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Smith vs. Tracy*, 36 N. Y. 82; *(ante*, p. 154) *Ahern vs. Goodspeed*, 72 N. Y. 108.

Thus in *Dingle vs. Hare, supra*, ERLE, C. J., observed: "The strong presumption is that when a principal authorizes an agent to sell goods for him he authorizes him to give all such warranties as are usually given in the particular trade or business;" and BYLES, J., added: "An agent to sell has a general authority to do all that is usual and necessary in the course of such employment." So in *Smith vs. Tracy, supra*, PORTER, J., speaking for the court, said: "The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book (Parsons) on the law of contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty.'"

Here the plaintiff offered to prove by different witnesses having the requisite knowledge the general custom of the trade as known and universally followed by dealers in fish, as to their being warranted or guaranteed against spoiling or turning red in transit; but it was excluded, and as we think erroneously, under the rules of law above stated. It would seem, however, that to be binding upon the defendants, such custom should be known to them or exist in their section of the country. Thus in *Graves vs. Legg, supra*, it was said by COCKBURN, C. J.: "The only question is whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

By the court: The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

III.

OF AGENT AUTHORIZED TO PURCHASE.

(56 WISCONSIN, 23.)

KOMOROWSKI vs. KRUMDICK.

(Supreme Court of Wisconsin, October, 1882.)

Action to recover for wheat alleged to have been sold to defendants through their agent, one Grist. Judgment below for plaintiff.

E. C. Higbee, for appellants.

Button Brothers, for respondent.

TAYLOR, J. * * * The power of Grist as the agent of the defendants was limited to purchases for cash, and nothing else, and he was expressly prohibited from taking wheat in store on their account. When the principal furnishes his agent, to buy on his account, sufficient funds to make the purchases, the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary. And in such case the principal will not be bound by a purchase made on credit, unless he has knowledge of the fact, and does something in ratification thereof, or unless it be shown that it is the custom of the trade to buy upon credit. The defendants furnished Grist the money to pay for all purchases made by him on their account, and the evidence tends to show that Grist did not deliver to them enough wheat to cover the amount of their advances.

There is nothing in the evidence tending to show that the defendants held Grist out as having any other powers as their agent than those expressly conferred upon him. There is no evidence that the defendants had ever ratified any purchase by Grist for them upon credit. There is no evidence, in fact, that he ever made any purchase except of the plaintiff upon credit. Nor is there any evidence that an agent to purchase wheat for a princi-

pal at a given place, and to ship the same to the principal at another place, has any implied authority to make the purchases upon the credit of the principal. There is nothing in the nature of the business itself, in the absence of any evidence as to the custom of the trade, which would justify a court in determining as a question of law that an agent to purchase wheat or other grain may bind his principal by a purchase on credit.

An agent to buy wheat or other grain must, in order to bind his principal, who furnishes in advance, the funds to make the purchases, buy for cash, unless he has express power to buy upon credit, or unless the custom of the trade is to buy upon credit; and in the absence of express authority, or proof of the custom of the trade to buy on credit, such agent cannot bind his principal by a purchase upon credit of a person who is ignorant of his real authority as between himself and his principal. Paley on Ag. 161, 162; *Jaques vs. Todd,* 3 Wend. 83; *Schimmelpennick vs. Bayard,* 1 Pet. 264; Story on Ag. §§ 225, 226; *Berry vs. Barnes,* 23 Ark. 411; *Stoddard vs. McIlvain,* 7 Rich. (S. C.) 525; Whart. on Ag. § 186; *Adams vs. Boies,* 24 Iowa, 96; *Tabor vs. Cannon,* 8 Met. 456; *Temple vs. Pomroy,* 4 Gray, 128; *Bank vs. Bugbee,* 1 Abb. Ch. App. 86. * * *

If the evidence is sufficient to show a sale upon credit to Grist as agent of the defendants, and that the wheat was delivered to the defendants and received by them of Grist, still they would not be liable to the plaintiff unless they received the wheat knowing it had been bought upon credit, or they had received the wheat of Grist knowing they had no funds in his hands at the time sufficient to pay for the same. If they furnished money to their agent sufficient at all times to pay for all the wheat they received from him, they had the right to suppose that all the wheat bought by Grist for them was paid for at the time it was delivered to them, and, if he had not in fact paid for it they would only be liable to the seller under the circumstances above stated. * * *

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NOTE.—See *Wheeler vs. McGuire, ante,* p. 362; *Hubbard vs. Tenbrook, ante,* 367; *Watteau vs. Fenwick, ante,* p. 369.

IV.

OF AGENT AUTHORIZED TO SIGN NEGOTIABLE PAPER.

(TENN. , 20 S. W. REP. 802, 18 L. R. A. 663.)

JACKSON ET AL. vs. NATIONAL BANK OF McMINNVILLE.

(Supreme Court of Tennessee, January, 1893.)

Action by Jackson, Mathews & Harris against the National Bank of McMinnville. The complainants were wholesale grocery merchants and had in their employ as a traveling salesmen or drummer one Gibson. Gibson's duty was to travel through the country, take orders from retail merchants for goods, and collect the bills as they became due. Gibson sold a bill of goods to Meadows. Before Meadows' bill became due, and while Gibson was still in the service of complainants, he proposed to Meadows that if he would then pay the bill, he would be allowed a discount of 2 per cent. Meadows agreed, and gave to Gibson his check on the defendant, payable to the order of Jackson, Mathews & Harris. On the face of the check was inserted the statement that it was "in full of acct. to date." Upon the back of the check Gibson indorsed the names of complainants, "Jackson, Mathews & Harris, by Gibson," and presented it to the defendant bank, where it was paid to him and charged against the deposit account of Meadows. Gibson failed to pay over or account to complainants for this money. Complainants having learned that Gibson had collected other money due them, and failed to account for it; discharged him. Gibson absconded.

Subsequently complainants sent to J. J. Meadows a statement of his account, requesting payment. Meadows replied that he had paid the account to Gibson by giving him a check on the defendant bank, and had settled with the bank, and taken up the check. Complainants demanded of defendant payment to them of the check, which was refused. Complainants filed their bill to hold the bank liable, and to recover the amount of the check, alleging that Gibson had no right to indorse complainant's name, and that the payment of the check to him was unauthorized. The defendant answered, stating, in substance, that Gibson was authorized to

indorse complainants' name to checks and receive the money thereon; that, if not expressly empowered, he was by implication authorized so to do; that Gibson, while in complainants' service, had frequently received checks payable to complainants, indorsed complainants' name, and received the money thereon, and that these acts of Gibson were known to and had been ratified by the complainants; that they were estopped from denying his authority, and that it was inequitable for complainants to undertake to visit the consequences of their own negligence and misplaced confidence upon respondent. The chancellor dismissed the bill. Complainants appealed.

T. C. Lind and *Smith & Dickinson*, for appellants.

Murray & Fairbanks, for appellee.

HOLMAN, J. (After stating the facts and disposing of another matter.) All the members of complainants' firm testify that Gibson had not been empowered to indorse the firm's name on checks received in payment of goods. Several drummers were examined, as witnesses for defendant, to prove, and a majority of them say with some qualification, that it is the usage and custom of traveling salesmen and drummers, who are empowered to collect and receipt bills and accounts, to indorse the names of their principals to checks received in payment for goods; and it is insisted that by implication Gibson was authorized to indorse complainants' name to the check, and receive the money. We do not think the usage or custom sufficiently proven, nor do we intimate an opinion that such a power can be inferred from usage or by implication. A person cannot by proof establish a usage or custom which, in his own interest, contravenes the established commercial law. *Vermilye vs. Express Co.*, 21 Wall. 139.

No authority will be implied from an express authority. Whatever powers are strictly necessary to the effectual exercise of the express powers will be conceded to the agent by implication. In order, therefore, that the authority to make or draw, accept, and indorse commercial paper as the agent of another, may be implied from some other express authority, it must be shown to be strictly necessary to the complete execution of the express power. The rule is strictly enforced that the authority to execute and indorse bills and notes as agent, will not be implied from an express authority to transact some other business, unless it is absolutely necessary

to the exercise of express authority. Tied. Com. Paper, § 77. Possession of a check payable to order, by one claiming to be agent of the payee, is not *prima facie* proof of authority to demand payment in the name of the true owner. Id. § 312. A bank is obliged by custom to honor checks payable to order, and pays them at its peril to any other than the person to whose order they are made payable. Id. § 431. It must see that the check is paid to the payee therein named upon his genuine indorsement, or it will remain responsible. *Pickle vs. Muse,* 88 Tenn. 380, 17 Am. St. Rep. 900.

An authority to receive checks in lieu of cash in payment of bills placed in the hands of an agent for collection does not authorize the agent to indorse and collect the check. *Graham vs. Institution,* 46 Mo. 186; 1 Wait, Act. & Def. p. 284; 1 Daniel, Neg. Inst. § 294. The indorsement of the check was not a necessary incident to the collection of accounts. *Graham vs. Institution,* 46 Mo. 186. It follows that a drummer or commercial traveler, employed to sell and take orders for goods, to collect accounts, and receive money and checks payable to the order of his principal, is not by implication authorized to indorse such principal's name to such checks. No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages, and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security. The decree of the chancellor is reversed, and a decree in favor of complainants against the defendant will be entered here for the amount of the Meadows check, with interest from date of filing the bill, and the costs.

(77 GEORGIA, 285, 4 AM. ST. REP. 85.)

KING vs. SPARKS.

(Supreme Court of Georgia, January, 1887.)

Action upon draft for $1,100. The opinion states the facts. Judgment below for plaintiff.

Key & Preston, J. H. Lumpkin, R. V. Hardeman and *Lanier & Anderson,* for plaintiffs in error.

Hardeman & Davis, for defendant in error.

BLANDFORD, J. Sparks brought his action upon a certain bill or draft which purported to be made by the Gordons and the plaintiffs in error. To this action the Kings pleaded *non est factum.* There was much evidence introduced to show whether Gordon had the right to sign the name of the Kings to this note or draft or to any note for any amount; but the plaintiffs' evidence clearly showed that he only had the authority from one of the Kings to sign his name to a note for five hundred dollars. The court charged the jury that if W. J. King authorized R. A. Gordon to sign his name to a note for five hundred dollars, and Gordon abused his authority, and signed King's name to a note for a larger amount than King authorized, and Sparks had no notice thereof, King would be liable. This charge of the court is the main exception and error assigned.

Gordon was but a special or particular agent to do a particular act, to wit, to sign King's name to a note for five hundred dollars; nor does it appear that Sparks knew that Gordon was King's agent for any purpose, as King's name was signed to the paper, and did not purport to have been signed by Gordon, agent. The agent had no authority to sign the name of King to this draft; his having done so is a mere forgery. King is not liable on the same to any one; it is not his act and deed, and he did nothing which estops him from so declaring. See Story on Agency, § 17; Code. § 2196; *New York Iron Mine vs. Negaunee Bank,* 39 Mich. 644, (*post,* p. 42).

The money advanced by Sparks on the draft was to Gordon and for Gordon's benefit, and Sparks was chargeable with notice as to the genuineness of the paper. The principle that where one of two innocent persons must suffer by the act of a third person, he

must bear the loss who put it in the power of such third person to inflict the injury, does not apply in this case, because the third person who did the injury, did so of himself and without warrant or authority from any one; it was not an abuse of a power granted by King to Gordon, but it was an act by Gordon wholly unwarranted. *Wood vs. Steele,* 6 Wall (U. S.) 80, 83. The charge was manifest error.

Judgment reversed.

NOTE.—Authority to execute negotiable instruments will be strictly construed. *Craighead vs. Peterson, ante,* p. 373; *Brantley vs. Southern L. Ins. Co.,* 53 Ala. 554; *Blackwell vs. Ketcham,* 53 Ind. 184; *Breed vs. First Nat. Bank,* 4 Colo. 481; *First National Bank vs. Gay,* 63 Mo. 33, 21 Am. Rep. 430.

V.

OF AGENT TO MANAGE BUSINESS.

(46 NEW JERSEY LAW, 448, 50 AM. REP. 442.)

BROCKWAY vs. MULLIN.

(Supreme Court of New Jersey, November, 1884.)

Action to recover for the loss of a wagon, harness, etc. The agreement under which they were furnished was made with the husband of appellant, who acted as her agent in carrying on the hotel, and was to the effect that horses and carriages furnished to guests of the hotel should be charged to the hotel, and that Brockway, as such agent, was to be responsible for their safe keeping and return. Brockway ordered the horse, wagon, etc., for a guest, who absconded with them, and the horse only was recovered.

R. Byington, for plaintiff in *certiorari.*

J. H. Meeker, for defendant.

REED, J. The reason relied upon for the reversal of this judgment which I will first notice is that there is no evidence in the case from which the court could find that the contract set out in the finding of the court was entered into between the plaintiff and Frank S. Brockway. But while the testimony is not very clear,

yet there was, in that of the plaintiff detailing the conversation between himself and Frank S. Brockway relative to the furnishing of carriages to the guests of the hotel, [evidence] from which the deduction might be drawn that such a contract was entered into.

The next reason, and the important reason, is that such a contract, if made, did not bind Mrs. Brockway, because it related to a matter which was outside of the agency with which she had invested her husband. The court found that the contract into which the husband entered with the plaintiff was, that he, the husband, as the agent of Mrs. Brockway, would be responsible for the safe keeping of the bailments, and to pay for the use of them.

The authority of the husband was to manage her business of keeping a hotel. She never authorized specially, nor had she knowledge of the arrangement with the plaintiff into which her husband had entered.

To support the case of the plaintiff, which was against the wife as well as the husband, it is necessary to bring the contract of the husband within the scope of the general authority to bind her in matters appertaining to the management of the hotel business. No testimony was delivered upon the trial for the purpose of showing that the business of hotel keeping included supplying teams to guests, or if so, upon what terms.

The court below must have held that it was a matter of judicial knowledge that the contract was made concerning a matter within range of the business in which the wife was engaged. Now, the legal liability of a hotel-keeper is to furnish lodging and food to guests and their accompanying horses. There is no legal liability to furnish horses or other means of locomotion. I am at a loss to find any ground for holding that this is within the occupation of the wife in this case.

It is said in the brief of plaintiff's counsel that it is a matter of common knowledge that no well-regulated hotel could do business and accommodate the public without making some such arrangement as this, and that it is a well-known occurrence for a guest who wishes a horse and carriage to apply at the desk, and an order is sent to the livery stable keeper, who furnishes the equipment to a man he does not see, and so has no means of ascertainining his responsibility. He therefore says that a contract like the one found by the court is a natural and necessary one for the protection of the livery-man.

Suppose this be admitted and it be for the purposes of this argument assumed that this is such a familiar transaction, that it rests within the cognizance of every one without proof of the fact, yet I do not think it makes in favor of the plaintiff's case. It only shows that the hotel, for the convenience of a guest, communicates with some one who furnishes the carriage. So also the communication is made with an express company or railroad company to take charge of a guest's luggage. So in both instances, the charges are paid at the desk of the hotel for the guest and put in his bill. In neither is it known that the proprietor of the hotel assumes the character of an expressman or hirer of a vehicle, or any responsibility for the performance of the duties of either. And this usage as claimed to exist within the knowledge of every one, makes the guest, and not the hotel keeper, the bailee.

If this be so, then if the hiring in this case was, as is claimed, a hiring to the hotel keeper, it was not within the scope of his business, and so did not bind the principal. If it was a hiring to the guest, then the contract of the husband encounters a legal difficulty in the shape of the statute of frauds. It was a verbal contract to answer for the default or miscarriage of another. *Kirkham vs. Marter*, 2 Barn. & Ald. 613; Brown Stat. Frauds, § 155. Therefore, to recover at all, it was essential for the plaintiff to stand upon a usage for hotel keepers to hire horses to their guests. For it is perceived that if he was the bailee, the letting to the guest was a new bailment in which he was the bailor. If a part of the business of a hotelkeeper is to let horses to his guests, and by reason of this the hotel proprietor is bound for a hiring of a horse for that purpose, with a contract extending the liability of the hirer to an absolute insurance, it is difficult to perceive the limit of the agent's authority in this direction.

If he can hire, he can purchase. He can establish a stable with an unlimited number of animals, and for their price and food and attendance, the proprietor, although ignorant of the act, will, by reason of the general authority to manage the business of the hotel given to the agent, become responsible. I think, as the case stands upon the record, with no proof that the transaction concerning which this contract was made was incident to the hotel business, and with the fact that the proprietress was ignorant of the transaction, there is nothing to support the agent's authority to bind her by such an agreement. So far as appears, it was neither within the

real authority nor the appearance of authority which she had conferred upon him.

Let the judgment, so far as it affects the defendant Josephine E. Brockway, be set aside.

Judgment set aside.

(11 COLORADO, 391.)

VESCELIUS vs. MARTIN.

(Supreme Court of Colorado, April, 1888.)

Action to recover a commission for finding a purchaser for appellant's business. The agreement to pay the commission was made with appellant's husband who managed the business for her. Plaintiff recovered and defendant appeals.

Messrs. Tilford, Gilmore and *Rhodes,* for appellant.

Mr. M. B. Carpenter, for appellee.

DE FRANCE, C. The evidence in this case fails to disclose that W. S. Vescelius was possessed of authority from his wife, the defendant, to make the contract sued upon. Without such proof the action must fail. The most that can be claimed for the evidence in this respect is that the husband was agent for the wife in conducting a retail grocery business. Granting the fact that his agency was a general one for this purpose, it does not follow that he had authority to sell out the entire business, stock and fixtures in one transaction. This authority is not to be implied from such an agency. But, if it were, the further authority in such agent to employ some one else to do so at the cost of his principal cannot be implied therefrom. It is not necessary to notice the other questions discussed by counsel. The evidence being insufficient to support the same, the judgment should be reversed and the cause remanded.

(39 MICHIGAN, 644.)

NEW YORK IRON MINE vs. FIRST NATIONAL BANK OF NEGAUNEE.

(Supreme Court of Michigan, October, 1878.)

Action by the bank against the iron mine upon four promissory notes, three of $5,000, to the order of Wetmore & Bro., signed "New York Iron Mine, by W. L. Wetmore," and one for $1,000 made by the Munising Iron Company, to the order of New York Iron Mine, signed by "W. L. Wetmore, President," and endorsed by the iron mine by Wetmore. The New York Iron Mine was a corporation whose works were at Ishpeming, Mich. Samuel J. Tilden of New York was the chief stockholder, and Wetmore held the rest of the stock except some nominal holdings necessary to make up the board of directors. Wetmore managed the mine, hired help and transacted all business at Ishpeming, and Mr. Tilden looked after the finances in New York, and this arrangement had continued about 14 years. Wetmore had paid the expenses of operations by drafts drawn upon Tilden and in this way had paid out over $3,000,000. The defense was a lack of authority in Wetmore to make or indorse this paper. Verdict below for plaintiff and defendant brought error.

W. P. Healy and *G. V. N. Lothrop,* for plaintiff in error.

Ball & Owen and *Ashley Pond,* for defendant in error.

COOLEY, J. (After stating the facts.) It was not disputed by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. *White vs. Westport Cotton Mfg. Co.,* 1 Pick. (Mass.) 215, 11 Am. Dec. 168, is not an authority for that position, nor is any other case to which our attention has been invited. In *McCullough vs. Moss,* 5 Denio (N. Y.) 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors so to do, could not bind the corporation by a note made in its name. *Murray vs. East India Company,* 5 B. & Ald. 204; *Benedict vs. Lansing,* 5 Denio (N. Y.) 283; and *The Floyd Acceptances,* 7

Wall. (U. S.) 666, are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and is so susceptible of abuse to the injury, and, indeed, to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of direction may determine.

But it was further insisted on the part of the plaintiff, that though Wetmore may never have had the corporate authority to make notes in the corporate name, yet, that the course of business was such, with the express or implied assent of Mr. Tilden, as to lead the public to suppose that his authority was ample, and that this course of business should be conclusive in favor of those who had taken the notes in good faith relying upon it. In support of this position, evidence was given that Wetmore was in the practice of taking notes from the creditors of the corporation, and procuring them to be discounted on his indorsement as general agent, and it appeared that the note of $1,000 counted on in this case was made for a balance remaining unpaid on a much larger note made by the Munising Iron Co., payable to the order of defendant and discounted by the plaintiff. And on this part of the case we are of opinion that enough appeared to warrant the jury in finding that the practice of Wetmore to indorse the paper of the company for collection or discount was known to Mr. Tilden and not objected to by him; that parties taking such paper had a right to believe the indorsement was authorized, and that it was made in the interest of defendant, and not in fraud of its rights. * * *

But it is further insisted on the part of the plaintiff that the defendant corporation is chargeable with negligence in suffering Wetmore to manage the business independently, as he did for so long a period, and that this negligence was so gross and so likely to mislead as to call for the application of the familiar and very just principle, that where one of two innocent parties must suffer from the dishonesty of a third, that one shall bear the loss who by his negligence has enabled the third to occasion it. *Merchants' Bank vs. State Bank,* 10 Wall. (U. S.) 604; *Bank of United States vs. Davis,* 2 Hill (N. Y.) 465; *Holmes vs. Trumper,* 22 Mich. 427–434, 7 Am. Rep. 661; *Farmers', etc., Bank vs. Butchers', etc., Bank,* 16 N. Y. 133; *Welland Canal Co. vs. Hathaway,* 8 Wend.

(N. Y.) 480, 24 Am. Dec. 51; *New York & N. H. R. R. Co. vs. Schuyler*, 34 N. Y. 30.

While the principle invoked is a very just and proper one, it is one that must be applied with great circumspection and caution. Any person may be said to put another in position to commit a fraud when he confers upon him any authority which is susceptible of abuse to the detriment of others; but if the authority is one with which it is proper for one man to clothe another, negligence cannot be imputed to the mere act of giving it. Any one who entrusts to another his signature to a written instrument furnishes him with the means of perpetrating a fraud by an unauthorized alteration or other improper use of it. But if the instrument was a proper and customary instrument of business, and has been issued without fraudulent intent in a business transaction, there is no more reason for imposing upon the maker the consequences of a fraudulent use of it than there is for visiting them upon any third person. In other words, it is not the mere fact that one has been the means of enabling another to commit a fraud that shall make him justly chargeable with the other's misconduct; but there must be that in what he has done or abstained from doing that may fairly be held to charge him with neglect of duty. * * *

But before the maxim which the plaintiff invokes can be applied to the case, it is necessary to determine not only that fault is imputable to the defendant, but also that the plaintiff is free from negligence. There must be one innocent party and one negligent party before the requirements of the maxim are answered; and the conduct of the plaintiff is therefore as important as that of the defendant. Was the plaintiff in this case free from negligence in discounting the three $5,000 notes? In law the officers of the bank must be held to have known that Mr. Wetmore had no right to make such paper without express authority, and we look in vain for any evidence that they demanded proof of such authority, or extended their inquiries beyond the agent himself. Moreover there was that on the face of these notes to suggest special caution; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them which was adverse to the interest of his principal. The notes also bore the largest interest admissible under our statutes; and this fact, in the case of a corporation whose credit was such that its paper would

be readily discounted and having its office in the city of New York, might well have arrested attention.

We do not think that when the bank discounted such paper without inquiry into the authority of Wetmore, it gave such evidence of prudence and circumspection as placed it in position to complain of Mr. Tilden's course of business as negligent. A fair statement of the case for the plaintiff is that both parties have been over trustful in their dealings with Mr. Wetmore; the defendant not more so than the plaintiff. Unfortunately for the plaintiff, the consequences of the overtrust have fallen upon its shoulders.

The circuit judge, in his instructions to the jury assumed that there was evidence in the case from which they might find that Wetmore was held out to the public as possessing the authority he assumed to exercise. We find no such evidence, and there must therefore be a new trial. The case of the $1,000 note is different, as already explained. * * *

Reversed.

NOTE.—See, also, *Perkins vs. Boothby*, 71 Me. 91; *Rossiter vs. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Sewanee Mining Co. vs. McCall*, 3 Head (Tenn.) 619.

BOOK III.

OF THE EXECUTION OF THE AUTHORITY.

CHAPTER I.

IN GENERAL.

(30 MINNESOTA, 388.)

THOMAS vs. JOSLIN.

(Supreme Court of Minnesota, May, 1883.)

Appeal by plaintiff from an order of the district court refusing a new trial, the action having been dismissed at the close of the plaintiff's evidence.

W. P. Clough, for appellant.

McNair & Gilfillan, for respondent.

BERRY, J. This action is brought to enforce specific performance of an agreement to sell and convey certain land alleged to have been executed by Whitney as agent of defendant, by whom the land was owned.

1. As to the fact of agency, we are of opinion that the letters introduced upon the trial, and which compose all the evidence in the premises, constitute Whitney defendant's agent to sell the land for $2,500 cash, subject to Miller's lease, and for a compensation of $50. They do not purport to be a contract directly with the plaintiff, the alleged vendee, to sell to him, but an authority to Whitney to enter into a contract of sale with some one.

2. The seal which Whitney affixed to the agreement was unauthorized, because Whitney's authority was not under seal; but it may be rejected as a separable excess of authority, and the agree-

ment stand as a simple contract. *Dickerman vs. Ashton*, 21 Minn. 538; *Long vs. Hartwell*, 34 N. J. Law, 116, (*ante*, p. 92); *Lawrence vs. Taylor*, 5 Hill, 107.

3. The agreement executed assumes to bind defendant to convey the land "in fee simple, and with a perfect title, free from all incumbrances." This is in excess of the authority conferred upon Whitney to make a sale subject to the Miller lease. "Where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad." *Alexander vs. Alexander*, 2 Ves. 640, 644; Ewell's Evans on Agency, 170; Story on Agency, §§ 165–168; Sugden on Powers, c. 9, § 2. The instrument executed by Whitney is not an agreement for a sale and conveyance subject to the Miller lease, with something superadded in excess of Whitney's authority, in which case the excess might be rejected, and the rest of the agreement sustained. But the thing ostensibly contracted for is entirely different from that authorized, and therefore the purported agreement is not "a complete execution of the power," and by consequence, not the agreement of Whitney's constituent, the defendant. Upon the facts as they now appear, the agreement is, therefore, under the rule above enunciated, bad and not enforceable. Order affirmed.

CHAPTER II

OF THE EXECUTION OF SEALED INSTRUMENTS.

(70 MISSOURI 18, 35 AM. REP. 404.)

McCLURE vs. HERRING.

(Supreme Court of Missouri, October, 1879.)

Ejectment. The opinion states the facts. The defendant had judgment below.

S. P. Huston, for appellant.

F. H. Ramer and *T. D. Neal,* for respondent.

HENRY, J. The plaintiff brought suit in the Harrison Circuit Court to its March term, 1877, against defendant for the possession of the southwest quarter of section 20, township 66, range 27, in said county. The petition was in the ordinary form of petition in ejectment. The defendant's answer was a general denial. The plaintiff read in evidence, to maintain the issues on his part, a United States patent, conveying the land to Leo Tarlton. Plaintiff then read in evidence a power of attorney from Leo Tarlton and wife to Thomas W. Hawkins, authorizing him as their attorney in fact, in their names, to sell and dispose of, in fee simple, all lands of which they were seized in the counties of Atchison, Andrew, Harrison, Grundy and Gentry in the State of Missouri, as well as other lands situate and lying in the State of Missouri, and for them, in their names and as their act and deed, to sign, seal, execute and deliver such deeds and conveyances for the sale and disposal of any part thereof, as their said attorney should think fit. Plaintiff next offered in evidence a certified copy of the record of a deed from Thomas W. Hawkins, for himself and Leo Tarlton and wife, to Alfred W. Lamb, which deed was as follows, affecting said lands, towit:

"Know all men by these presents, that I, Thomas W. Hawkins of Marion county, state of Missouri, for myself, and as attorney for Leo Tarlton and Mrs. G. Agusta Tarlton, his wife * * *

by their duly authorized letters of attorney, under their hands and seals, in consideration $1,850, to us paid by Alfred W. Lamb of Marion county, state of Missouri, do sell and convey to said Alfred W. Lamb, and his heirs forever, the following described tracts or parcels of land lying and situate in the county of Harrison, and state of Missouri, to wit: The * * * southwest quarter of section 20, township 66, range 27 * * * To have and to hold the said tracts or parcels of lands, with all privileges, etc., to said grantee and his heirs forever. And we, the said Leo Tarlton and G. Agusta Tarlton, do covenant with said grantee and his heirs that we are rightly seized in fee simple of said tracts or parcels of land, etc., and that we and our heirs will warrant the said premises to said grantee and his heirs forever against the lawful claims of all persons. In witness whereof, I, Thomas W. Hawkins, in my own right, have hereunto set my hand and seal, and as attorney for said Leo Tarlton and Mrs. G. Agusta Tarlton, have hereunto set their hands and seals.

"THOMAS W. HAWKINS, [L. S.]
"LEO TARLTON, [L. S.]
"G. AGUSTA TARLTON, [L. S.]
"By THOMAS W. HAWKINS, their Attorney in fact."

Defendant by his attorneys, objected to the introduction of said deed, because: 1st. It was the deed of the attorney, Hawkins, and not that of Tarlton and wife; 2nd. It is ineffectual as a conveyance by Tarlton and wife, of any title owned by them in the land in controversy; 3d. The power of attorney under which the deed was made did not sufficiently designate the land to be conveyed by the attorney; 4th. The deed does not purport to be that of the principal, nor to convey the title of the principal, but only that of the attorney. The court sustained the defendant's objections, and rejected the deed as evidence, to which plaintiff excepted, and leave to set aside nonsuit taken being refused, plaintiff brings this case here by appeal.

Mr. Washburn, in his work on Real Property (vol. 2, 2d ed., 576), reviews the cases on the subject presented for consideration here by the action of the court in excluding the deed from the jury, and admits that there is a conflict of opinion, but states the doctrine deducible from them thus: "The leading doctrine running through them, though not always applied, seems to be that to make such a deed valid, the instrument itself must in terms show that it is the deed of the principal, that he makes the grants

and covenants, and that the seal is his. The instrument, in some part, must also show that its execution by the principal was done by the attorney named. If this all appears clearly in any part of the instrument, the precise form or arrangement of the words does not seem to be essential."

In *Elwell vs. Shaw*, 16 Mass. 42, 47, 8 Am. Dec. 126, reported also in Am. Lead. Cas., as a leading case on the subject, the deed recited the power of attorney to Joshua Elwell, and then proceeded as follows: "Know ye that I, the said Joshua, by virtue of the power aforesaid, etc., do hereby bargain, grant, sell and convey, etc.," and concluded: "In testimony whereof, I have hereunto set the name and seal of said Jonathan, this, etc. Joshua Elwell. (Seal.)" The body of the deed there is similar in some respects to the deed in this case, but in the execution of the deed there is a marked and important difference. Here the names of the principals are signed as grantors, and their seals attached, while neither in the body nor in the execution of the deed in *Elwell vs. Shaw*, does the principal appear as grantor. In *Mussey vs. Scott*, 7 Cush. (Mass.) 216, 54 Am. Dec. 719, Metcalf, J. observes: "But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or no one." On that principle alone *Elwell vs. Shaw*, may be maintained, and there are numerous other adjudged cases which were controlled by that principle.

Fowler vs. Shearer, 7 Mass. 15, is frequently cited in discussions on this subject. There John Fowler, the husband, gave his wife, Abigail, a power of attorney to execute a deed for land. She made a conveyance as follows: "Know ye that I, Abigail Fowler, of Palmer, etc., and also as attorney to John Fowler, etc., in consideration of, etc., paid by Daniel Shearer, of Palmer, have given, granted, and by these presents do give, grant, etc." The language of the remainder of the deed purported to be her conveyance and her covenants. The instrument concluded: "In witness whereof, I have hereunto set my hand and seal, this 7th day of August, 1805. Abigail Fowler. (Seal.)" The court held that it was not the deed of the husband. As in *Elwell vs. Shaw*, the principal did not execute it, and therein both differ from the case at bar.

Harper vs. Hampton, 1 Harr. & J. (Md.) 709, was a case in which the attorney signed his own name as attorney for his principal, and

it was held to be the deed of the attorney, and not of the principal. The contrary, however, was held by this court in *Martin vs. Almond*, 25 Mo. 133, and while the adjudications on the subject are not harmonious, we think the doctrine of that case fully sustained by the weight of authority.

There is a general disposition to relax the rigid rules of the common law in regard to conveyances. The formality and exactness formerly deemed necessary are not now required. There is a disposition to effectuate the intention of the parties, where that can certainly be ascertained from the deed. But to return to the main question. *Shanks vs. Lancaster*, 5 Gratt. (Va.) 110, 118, 50 Am. Dec. 108, is a case directly in point. "The deed made by the attorney was in the name of Abraham Beckner, attorney in fact for Jacob Beckner and Catherine, his wife, of the first part." It proceeded in the same style to convey the land, and in the same style he covenanted for himself, his heirs, and executors, in behalf of said Jacob Beckner and Catherine, his wife, under the authority of a power of attorney duly executed, and of record, to warrant the title to the plaintiff free from the claims of himself and his heirs, and from the claims of Jacob Beckner and wife, and their heirs, and it concluded: "In witness whereof, the said Abraham Beckner, attorney in fact, for Jacob Beckner and Catherine, his wife, as aforesaid, has hereunto set his hand and seal, etc. Jacob Beckner (seal) and Catherine, his wife (seal), by Abraham Beckner (seal) their attorney in fact." The court held the deed sufficient to pass the title of Jacob Beckner to the grantee.

In *Hale vs. Woods*, 10 N. H. 470, 34 Am. Dec. 176, Daniel and Zachariah King were joint owners of a tract of land, and Daniel was empowered by Zachariah to sell and convey his interest. He sold the land and made the following conveyance: "I, Daniel King, as well for myself, as attorney for Zachariah King, doth for myself and said Zachariah, remise, release and forever quitclaim the premises (describing them) together with all the estate, etc., of us, the said Daniel and said Zachariah, which we now have, etc., and we, the said Daniel and said Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free from all incumbrances, and that the grantee may quietly enjoy the same without any claim or hindrance from us, or any one claiming under us, or either of us. In witness, whereof, we, the said Daniel, for himself, and as attorney aforesaid, have hereunto set our hands and seal, etc. (Signed) Daniel King, and also Daniel

King, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature.

The court held the power properly executed, and that the deed passed the title of Zachariah. Upham, J., said: "The covenants in this case in the deed are clearly the covenants of the principal; and we think from the terms used, the grant purports to be the act of the principal. The grant is for said Daniel and Zachariah, and of all the interest which we now have, or have heretofore had in the premises. If these terms, together with the covenants, purport a conveyance of the interest of the principal, the execution of the deed would seem to be sufficient to effect the intent of the instrument."

Those cases are not distinguishable in principle form from the case at bar, and the facts in each case were such as to raise the precise question presented by this record. See, also, *Butterfield vs. Beall,* 3 Ind. 203; *Varnum vs. Evans,* 2 McMullan, (S. Car.) 409. In *Townsend vs. Hubbard,* 4 Hill, (N. Y.) 351, 359, Walworth, Ch., said: "To bind the principal by deed, no particular form of words is necessary, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal, and not the seal of the attorney or agent merely."

In *Hunter's Admr. vs. Miller's Exrs.,* 5 B. Monr. (Ky.) 612, 620, the court laid down the following, which Messrs. Hare and Wallace in their note to *Elwell vs. Shaw,* say is a reasonable rule: "If it clearly appears, on the face of the instrument, who is intended to be bound, and if the mode of execution be such as that he may be bound, the necessary consequence of the universal principle applicable to contracts is that he is bound, and that if such appears to be the intention of the parties, he alone is bound." Here in the body of the deed, Hawkins declares that he makes the conveyance as attorney for Leo and G. Agusta Tarlton, under their power of attorney, and said Tarlton and wife, in the body of the deed covenant with Lamb, the grantee, that they are rightfully seized in fee simple of the lands, and that they and their heirs will warrant the premises to said grantee and his heirs forever, etc. The consideration, $1,850, is acknowledged in the deed to have been paid to "us," not to the attorney alone. The names of the principals were severally signed to the deed, with a seal to each, "By Thomas W. Hawkins, their attorney in fact."

The manner in which the deed was executed, the covenant entered into by Tarleton and his wife that they would warrant the title to Lamb, etc.; the declaration in the deed that Hawkins is acting for the principals, naming them, by virtue of their power of attorney; the acknowledgement of the receipt of the money by "us," unmistakably show that it was the deed of the principals; and as this all appears clearly in the instrument, "the precise form or arrangement of the words does not seem to be essential." A review or even brief notice of all the adjudications on this subject, besides requiring immense labor, would only serve to show the conflict of the authorities, and the very nice distinctions occasionally drawn either to uphold or defeat a conveyance, but we are of opinion that a large majority of the courts in which the most rigid rules on the subject are maintained, would sustain this deed. The court erred in excluding it from the jury as evidence of title in Lamb.

(Omitting a minor point.)

All concurring, the judgment is reversed and the case remanded.

Reversed and remanded.

(48 NEW JERSEY LAW, 22, 57 AM. REP. 534.)

KNIGHT vs. CLARK.

(Supreme Court of New Jersey, February, 1886.)

Action on the following contract:

"$407.17, FIVE POINTS, GLOUCESTER CO., N. J.,
October 28th, 1884.

"For value received we, Allen S. Clark, William M. Colson and Joseph H. Knight, members of the township committee of the township of Harrison, county of Gloucester, N. J., and our successors in office, promise to pay to Edward B. Knight or order, in six months from the date hereof, with lawful interest from date, without defalcation.

And in case of default of payment as aforesaid, we hereby empower any attorney at law to be appointed by said Edward B. Knight or his assigns, to appear in any court which said Edward B. Knight or his assigns may select, and commence or prosecute a

suit against us or our successors in office on said note, to confess judgment for all and every part of the interest or principal on said note in the payments of which we or our successors in office may be delinquent. Witness our hands and seals, this 28th day of October, A. D. 1884.

"ALLEN S. CLARK, [L. S.]
"WILLIAM M. COLSON, [L. S.]
"Witness: "JOSEPH H. KNIGHT, [L. S.]
"WM. F. IREDELL."

David A. Pancoast, for plaintiff.

Robert S. Clymer, for defendants.

BEASLEY, C. J. The court had been asked by the counsel of the respective parties to decide the question involved irrespectively of the pleadings.

The case will be decided from the facts stated in the record, and the admitted fact that the debt secured by the sealed instrument sued on was the debt of the township of Harrison. The only inquiry therefore is whether the defendants, by the form of the deed executed by them, have made themselves personally responsible for this public debt.

The counsel of the plaintiff, in support of the right of action, has referred to the case of *Dayton vs. Warne,* 41 N. J. L. 659. But that case is not in any degree applicable, for it was a case of a private agency, and the defendants, in the present instance, acted in a public capacity. The principle of decision in the reported case was that when a private agent does not attempt, in a sealed instrument, to bind his principal, but in terms imposes the obligation on himself he incurs by such an act a personal responsiblity. But it is well settled that a public agent does not stand on the same footing. It is much against public policy to cast the obligations that justly belong to the body politic upon this class of officials.

Upon both reason and authority we think the law is against the plaintiff's claim.

The case of *Hodgson vs. Dexter,* 1 Cranch., (U. S.) 346 is directly in point. The facts were in brief the following, viz.: The action was in form of covenant against Dexter, who had lately been secretary of war, and was founded on covenants contained in a lease, to keep in good repair and deliver up in good order a certain building hired for the use of the government. The building

had been destroyed by fire, and the sole question was whether Dexter was personally liable. The lease was a deed *inter partes*, which Dexter had sealed as an individual. In the commencement of the instrument he had described himself "secretary of war," and to the performance of the covenants he had bound himself (but not as secretary) and "his successors."

Under these circumstances it was held that Dexter was not bound personally, Chief Justice MARSHALL saying: "A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals."

This decision has, we believe, been universally approved of, and it is evident that unless overruled by this court, it must conclude this controversy. With everything that was said in this case, as well as in the conclusion reached by the court, we entirely concur.

It will be observed that in the sealed bill forming the basis of the present suit, the defendants describe themselves as "members of the township committee of the township of Harrison," and bind themselves and their successors in office, and authorize judgment to be entered against themselves or "their successors in office." These references to the official nature of the business embraced in the instrument, and the position of the defendants with reference to it, are quite as significant as those contained in the lease, the substance of which is above recited.

The defendants must have judgment.

Judgment affirmed.

NOTE.—See *Brown vs. Bradlee, post, p.* —.

(64 NEW YORK 357, 21 AM. REP. 617.)

BRIGGS vs. PARTRIDGE.

(New York Court of Appeals, March, 1876.)

Appeal by plaintiff from judgment of the General Term affirming a judgment below for defendant. The action was brought to recover money claimed to be due upon a contract for the purchase of lands. According to the complaint and the evidence offered, it appeared that defendant had by parol, constituted one Hurlburd his agent, for the purpose of purchasing the lands in question

belonging to the plaintiff; that thereupon Hurlburd, without disclosing the agency, entered into a contract under seal with plaintiff, whereby he agreed to purchase such lands at a specified price; the contract was executed by Hurlburd in his own name, and the plaintiff did not at the time know that the defendant was the real principal in the matter; a small part only of the purchase money was paid. Plaintiff in his complaint avowed himself ready to execute a good and sufficient deed. Such other facts as are material appear in the opinion.

Edward D. McCarthy, for appellant.

Wm. F. Shepard, for respondent.

ANDREWS, J. The defendant was not a party to the agreement for the sale and purchase of the land. He did not sign it himself, nor did it purport to have been executed for him by Hurlburd. His name does not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between the plaintiff and Hurlburd. The former covenants to sell and convey the lands to Hurlburd, and Hurlburd covenants to purchase and pay the purchase-money as stipulated. The defendant took no part in the negotiation of the agreement, and the plaintiff, when he made and executed it, had no knowledge that Hurlburd was acting as the agent of the defendant. The agreement was under seal, each party affixing his own seal to the instrument. Hurlburd, the apparent purchaser, was in fact acting in the transaction as the agent of the defendant, his undisclosed principal, under an oral authority to enter into the contract in his behalf; and the defendant furnished the money to make the down payment to the broker who negotiated the sale.

This action is brought by plaintiff upon the agreement to recover the unpaid purchase-money, and it is sought to enforce it against the defendant as the real purchaser and party, upon the ground that Hurlburd, the nominal purchaser, was acting for him and by his authority in the transaction. The real question is, can the vendor, in a sealed executory agreement, *inter partes,* for the sale of land, enforce it as the simple contract of a person not mentioned in or a party to the instrument, on proof that the vendee named therein, and who signed and sealed it as his contract, had oral authority from such third person to enter into the contract of purchase, and acted as his agent in the transaction, and can the vendor

on this proof, there having been no default on his part, and he being ready and willing to convey, recover of such third person the unpaid purchase-money? This question here arises in a case where the vendor, so far as it appears, has remained in possession of the land, and where no act of ratification of the contract by the undisclosed principal has been shown.

It is not disputed, and indeed it cannot be, that Hurlburd is bound to the plaintiff as covenanter, upon the covenants in the agreement. He covenants for himself and not for another, to pay the purchase money, and by his own seal fixes the character of the obligation as a specialty. He is liable to perform the contract irrespective of the fact whether it can be enforced against his nominal principal. On the other hand, it is equally clear that Hurlburd's covenant cannot be treated as or made the covenant of the defendant. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. *Beckham vs. Drake,* 9 M. & W. 79; *Spencer vs. Field,* 10 Wend. (N. Y.) 88; *Townsend vs. Hubbard,* 4 Hill (N. Y.), 351.

In the case last cited, it was held that where an agent duly authorized to enter into a sealed contract for the sale of land of his principals, had entered into a contract under his own name and seal, intending to execute the authority conferred upon him, the principals could not treat the covenants made by the agents as theirs, although it clearly appeared in the body of the contract that the stipulations were intended to be between the principals and the purchasers, and not between the vendees and the agent. The plaintiffs in that case were the owners of the land embraced in the contract, and brought their action in covenant to enforce the covenant of the vendees to pay the purchase-money, and the court decided that there was no reciprocal covenant on the part of the vendors to sell, and that for want of mutuality in the agreement the action could not be maintained.

It is clear, that unless the plaintiff can pass by the persons with whom he contracted, and treat the contract as the simple contract of the defendant, for whom it now appears that Hurlburd was acting, this action must fail. The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name

of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. *Higgins vs. Senior*, 8 M. & W. 834 (*post*, p. ——); *Truman vs. Loder*, 11 Ad. & El. 594; *Dykers vs. Townsend*, 24 N. Y. 61; *Coleman vs. Bank*, 53 N. Y. 393; *Ford vs. Williams*, 21 How. (U. S.) 289; *Huntington vs. Knox*, 7 Cush. (Mass.) 371; *The Eastern R. R. Co. vs. Benedict*, 5 Gray, (Mass.) 566, 66 Am. Dec. 384; *Hubbert vs. Borden*, 6 Whart. (Pa.) 91; *Browning vs. Insurance Co.*, L. R. 5 P. C. 263; *Calder vs. Dobell*, L. R. 6 C. P. 486. Story on Agency, 148, 160.

It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. In some of the earlier cases the doctrine that a written contract of the agent could be enforced against the principal was stated, with the qualification that it applied when it could be collected from the whole instrument, that the intention was to bind the principal. But it will appear, from an examination of the cases cited that this qualification is no longer regarded as an essential part of the doctrine. Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of the opinion that the practical effect of the rule as now declared is to promote justice and fair dealing.

There is a well recognized exception to the rule in the case of notes and bills of exchange, resting upon the law merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent. *Barker vs. Mechanics' Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Pentz vs. Stanton*, 10 Id. 271, 35 Am. Dec. 558; *De Witt vs. Walton*, 9 N. Y. 570; *Stackpole vs. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Eastern R. R. vs. Benedict, supra; Beckham v. Drake*, 9 M. & W. 79. That Hurlburd had oral authority from the defendant to enter into a contract for the purchase of the land, and that he was acting for the defendant in making it is admitted;

and if the contract had been a simple contract and not a specialty the defendant would, I think, have been bound by it within the authorities cited.

No question would arise under the statute of frauds, for the statute prescribing what shall be necessary to make a valid contract for the sale of land requires only that the contract, or some note or memorandum thereof expressing the consideration, should be in writing and subscribed by the party by whom the sale is to be made, or his agent lawfully authorized. 2 R. S. 135, §§ 8, 9. In this case the contract was signed by the vendors; and even if it had been executed on their part by an agent pursuant to an oral authority, it would have been a valid execution within the statute. *Lawrence vs. Taylor,* 5 Hill, (N. Y.) 113; *Worrall vs. Munn,* 5 N. Y. 229, 55 Am. Dec. 330. But the vendee's contract need not be in writing. *McCrea vs. Purmort,* 16 Wend. (N. Y.) 469, 30 Am. Dec. 103.

We return then to the question originally stated. Can a contract under seal, made by an agent in his own name for the purchase of the land, be enforced as the simple contract of the real principal when he shall be discovered. No authority for this broad proposition has been cited. There are cases which hold that when a sealed contract has been executed in such form, that it is in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts in *pais,* and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agreement. *Randall vs. Van Vechten,* 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; *DuBois vs. Canal Co.,* 4 Wend. 285; *Lawrence vs. Taylor, supra.* See also *Evans vs. Wells,* 22 Wend. 324; *Worrall vs. Munn, supra;* Story on Agency, § 277; 1 Am. Lead Cas. 735, note.

The plaintiff's agreement in this case was with Hulburd and not with the defendant. The plaintiff has recourse against Hulburd on his covenant, which was the only remedy which he contemplated when the agreement was made. No ratification of the contract by the defendant is shown. To change it from a specialty to a simple contract, in order to charge the defendant is to make a different contract from the one the parties intended. A seal has lost most

of its former significance, but the distinction between specialties and simple contracts is not obliterated. A seal is still evidence, though not conclusive, of a consideration. The rule of limitation in respect to the two classes of obligations is not the same. We find no authority for the proposition that a contract under seal may be turned into simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *dehors* the instrument that the nominal party was acting as the agent of another, and especially in the absence of any proof that the alleged principal has received any benefit from it, or has in any way ratified it, and we do not feel at liberty to extend the doctrine applied to simple contracts executed by an agent for an unnamed principal so as to embrace this case. The general rule, is declared by SHAW, C. J., in *Huntington vs. Knox*, 7 Cush. (Mass.) 374: "Where a contract is made by deed, under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and, therefore, if made by an attorney or agent, it must be made in the name of the principal in order that he may be a party, because otherwise he is not bound by it."

The judgment of the general term should be affirmed.

All concur. Judgment affirmed.

NOTE.—See also *Mahoney vs. McLean*, 26 Minn. 415; *Lancaster vs. Knickerbocker Ice Co.*, 153 Penn. 427.

CHAPTER III.

OF THE EXECUTION OF SIMPLE CONTRACTS.

I.

OF THE EXECUTION OF NEGOTIABLE PAPER.

(76 CALIFORNIA, 203, 9 AM. ST. REP. 193.)

HOBSON vs. HASSETT.

(Supreme Court of California, May, 1888.)

Rutledge and *McConnell*, for the appellant.

Vaughn and *Cradlebaugh* and *G. A. Johnson*, for the respondent.

BELCHER, C. C. This action was brought to recover the amount due on a promissory note which reads as follows:

"September 7, 1881.

"$1,135. One day after date, without grace, we promise to pay A. D. Hobson or order the sum of eleven hundred and thirty-five dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin, at the rate of ten per cent. per year from date until paid.

"A. HASSETT, President."

The court below found that prior to the year 1878, the Granger's Business Association of Healdsburg was duly organized as a corporation, and has existed as such ever since; that on the eighth day of January, 1878, the said corporation became indebted to the plaintiff in the sum of two thousand dollars, and on that day made and delivered its promissory note to plaintiff for that amount; that on the seventh day of September, 1881, plaintiff presented this note to one Bagge, who was the book-keeper and accountant of the corporation, for payment, and requested that the corporation pay him nine hundred dollars in cash, and give him a new note for the balance; that defendant Hassett was president of the corporation at that time; that Bagge paid the nine hundred dollars, and drew a new note for the balance and requested

defendant, as president of the corporation to sign it, which defendant intended to do, but signed only his own name, adding thereto the word "president;" that the note so executed is the note set out in the complaint; that defendant and Bagge only intended to make and deliver the note to the corporation, and did not then or at any other time say or do anything to lead plaintiff to believe that defendant intended to make or deliver his own note, and not the note of the corporation; that plaintiff could not read writing, and did not at the time know in what manner the note was executed, but at the end of every month, for eighteen months thereafter, he presented it, and received from the corporation the interest due thereon, and never claimed or demanded from the defendant the payment thereof prior to the bringing of this action.

Upon these facts the court found, as a conclusion of law, that the note was the note of defendant, and not of the corporation, and thereupon judgment was entered in favor of the plaintiff. The defendant appealed, and the case comes here on the judgment roll.

The principal contention of the appellant is, that the note was the note of the corporation, and not of the defendant, and that the court erred in its conclusions of the law to the contrary.

In view of the large number of adjudicated cases, it is sometimes difficult to determine whether a note or a bill of exchange, drawn by an agent, but for the use and benefit of his principal, binds the agent personally or not. There are, however, some general rules upon the subject, which seem to be well settled.

JUDGE STORY says: "When, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent." Story on Promissory Notes, sec. 68. But, "if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Id. sec. 69.

Professor Parsons says: "If an agent make a note in his own name, and add to his signature the word 'agent,' but there is nothing on the note to indicate who is principal, the agent will be personally liable, just as if the word 'agent' were not added." 1 Parsons on Notes and Bills, p. 95. And "one who puts his name on negotiable paper will be liable personally, as we have seen, although he acts as agent, unless he says so, and says also who his

principal is; that is, unless he uses some expression equivalent, to use Lord Ellenborough's language, to 'I am the mere scribe.' For if the contruction may fairly be that while he acts officially, or at the request of others, yet what he does is still his own act, it will be so interpreted." Id. p. 102; and see, also, *Sayre vs. Nichols*, 5 Cal. 487; *Stackpole vs. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Williams vs. Robbins*, 16 Gray, 77, 77 Am. Dec. 396; *Tucker Mfg. Co. vs. Fairbanks*, 98 Mass. 101; *Sturdevant vs. Hull*, 59 Me. 172, 8 Am. Rep. 409; *Pentz vs. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Powers vs. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

The cases cited by appellant are not in conflict with the rules above stated. In *Farmers' and Mechanics' Bank vs. Colby*, 64 Cal. 352, the note was signed by "G. A. Colby, Prest. Pac. Peat Coal Co., D. K. Tripp, Sec. *pro tem.*" It was indorsed by Colby and four others. The action was against Colby and Tripp as makers, and the other defendants as indorsers. The court said: "Read as a whole, we think it apparent from its face that it is the note of the company indorsed by the individuals."

In *Bean vs. Pioneer Mining Co.*, 66 Cal. 451, 56 Am. Rep. 106, the note was signed "Pioneer Mining Company, John E. Mason, Supt." The plaintiff sought to hold Mason personally responsible on the note, but the court considered him not bound. The court said: "The signature is not John E. Mason, superintendent of the Pioneer Mining Company," the last portion of which, in the absence of any words in the body of the note indicating an intention that it should be an obligation of the company, might, it is claimed, be held to be merely *descriptio personæ*. But here the words 'Pioneer Mining Company,' precede the name 'John E. Mason.'"

In *Mechanics' Bank of Alexandria vs. Bank of Columbia*, 5 Wheat. (U. S.) 326, the question was whether a certain act done by the cashier of a bank was done in his official or individual capacity. The action was based upon a check, and the court said: "But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate and not an individual transaction; to which must be added the circumstance that the cashier is the drawer and the teller the payee; and the form of ordinary checks deviated from by the substitution of 'to order,' for 'to

bearer.' The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction."

In *Carpenter vs. Farnsworth*, 106 Mass. 561, 8 Am. Rep. 360, the action was on a check having the words "Ætna Mills" printed in the margin and signed "J. D. Farnsworth, Treasurer." The court said "that this check manifests upon its face that the writing is the act of the principal, though done by the hand of an agent; or, in other words, that it is the check of the Ætna Mills, executed by Farnsworth as their treasurer and in their behalf."

The other cases cited do not need special notice.

In the light of the rules of law above announced, the question then is, did the defendant, by signing the note as he did, make himself personally responsible for its payment? It seems to us that there can be but one answer to this question, and that is, that he did. There is nothing on the face of the note to show that there was any principal back of the defendant. He signed his own name, and wholly failed to indicate, if he had a principal, who or what the principal was. The word "president," which he added to his name, must therefore be regarded as a mere *descriptio personæ*.

It is further contended that, as the promissory note of the defendant, it was without consideration. We do not think this position can be maintained. The note imports a consideration, and it must be presumed that when the old note was paid it was given up, and a new one taken in its place. The old note was a sufficient consideration for the new.

We think the court drew correct conclusions from the facts before it, and therefore advise that the judgment be affirmed.

NOTE.—See, also, *Davis vs. England*, 141 Mass. 587; *Exchange Bank vs. Lewis County*, 28 W. Va. 273; *Robinson vs. Kanawha Valley Bank*, 44 Ohio St. 441; *Tilden vs. Barnard*, 43 Mich. 376, 38 Am. Rep. 197; *Rendell vs. Harriman*, 75 Me. 497; *Burlingame vs. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Powers vs. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

(54 NEW JERSEY LAW 208, 16 L. R. A. 143.)

REEVE vs. FIRST NATIONAL BANK OF GLASSBORO.

(New Jersey Court of Errors and Appeals, February, 1892.)

Action to recover upon a promissory note. The opinion states the facts. Plaintiff had judgment below.

J. J. Crandall, for plaintiff in error.

Lewis Starr, for defendant in error.

REED, J., delivered the opinion of the court. This cause was tried at the Gloucester Circuit. The action was brought upon certain promissory notes. of which the following is a copy:

"$97 70-100. GLASSBORO, N. J., Dec. 18, 1890.

"Three months after date we promise to pay to the order of Thos. Reeve, at the First National Bank of Glassboro, ninety-seven and 70-100 dollars, without defalcation, value received.

"WARRICK GLASS WORKS.

"J. PRICE WARRICK, Pres.

Two additional notes, one for $90.80 and another for $140.10, were in the same form. Each was endorsed by the payee and held for value by the First National Bank of Glassboro. At maturity a demand of payment was made at the bank upon the Warrick Glass-Works, payment refused, and notice of protest duly given to Reeve, the payee and indorser. The defense interposed by the defendant's counsel was that the note was signed by the Warrick Glass Works and by J. Price Warrick as joint makers; that demand of payment should have been made upon each of the joint makers; and therefore it was insisted that the failure to make a demand upon Warrick relieved the indorser from liability. The only facts proved in the case bearing upon the question mooted were that the note was given by the corporation for feed furnished, and that J. Price Warrick was the president of the company. At the conclusion of the plaintiff's case a motion to nonsuit was made and overruled. This action of the trial court was the subject of the only material exception.

We are of the opinion that the refusal to non-suit was correct. The note was that of the Warrick Glass Works alone. The demand of payment was properly made upon the corporation only.

The cases in which the liability of parties to paper similar to this is determined are not uniform in their results. Indeed, great contrariety of views can be found in the decisions upon this question. A detailed examination of those cases would not result in much profit. The result of the best considered decisions is this: Where nothing appears in the body of a note to indicate the maker, and the note is signed by a corporate name under which name appears the name of an officer of the company, with his corporate official title affixed thereto, in such case the note is taken conclusively to be that of the corporation. Where however, a note drawn in a similar form, except as to the signatures, is subscribed by the name of an officer of a corporation, to which name is affixed his title as an officer of a particular corporation, the result is not the same. In respect to notes drawn in the last mentioned form, the courts in most of the states hold that there is an ambiguity arising out of this manner of coupling the names of the natural person and of the corporation. It is therefore open to the parties to introduce extrinsic testimony to disclose facts from which it can be concluded which of the parties should be regarded as the maker.

In this state the rule is that a note drawn in this form is *prima facie* the note of the person signing and not the note of the corporation; but this is only a disputable presumption, and, upon the ground of an existing ambiguity concerning the maker, evidence is admissible to show that it was intended to be the note of the corporation, which evidence can, of course, be met with counter-evidence of the same character. This rule was definitely settled in the case of *Kean vs. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182. In this case a note was signed, "John Kean, Prest. F. & S. S. R. R. Co." It was held to be *prima facie* the note of Kean, but it was held that parol evidence might be introduced to show whether it really was the personal note of the officer or was the note of the railroad company. If, therefore, the present note had been signed "J. Price Warrick, President of the Warrick Glass Works," it, in the absence of parol testimony to show a contrary intention, would be regarded as the note of Warrick. As the notes are signed with the name of the corporation, followed by the words, "J. Price Warrick, Pres.," they are taken to be corporation paper.

This conclusion seems to rest upon rational ground. The name of the corporation signed first stands as a principal, and that of the officer as agent. The name of a corporation, so placed, raises the implication of a corporate liability. To so place it requires

the hand of an agent. The name of an officer of such corporation, to which name the official title is appended, put beneath the corporate name, implies the relation of principal and agent. It means that, inasmuch as every corporate act must be done by a natural person, this person is the agent by whose hand the corporation did the particular act. This form of signature is just as significant in respect to the notes in question as if the name the "Warrick Glass Works" had been written, "Per Warrick, Agent." The following are cases in which notes in similar form to those now in suit have been held to be solely the notes of the corporation whose name first appeared, followed by the name of an officer: *Bean vs. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106; *Atkins vs. Brown*, 59 Me. 90; *Castle vs. Belfast Foundry Co.*, 72 Me. 167; *Millar vs. Roach*, 150 Mass. 140, 6 L. R. A. 71; *Draper vs. Massachusetts Steam Heat Co.*, 5 Allen, 338; *Liebscher vs. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171; 5 L. R. A. 496, (*post*, p. ——).

I do not perceive any significance in the use of the words "we promise to pay," instead of "the company promises to pay." The contention was that the use of these words raised an implication that it was the joint note of the corporation and Warrick. But, as has been remarked in more than one of the cases cited, in which the notes contained a promise in like form, the word "we" is often used by a corporation aggregate. *Draper vs. Massachusetts Steam Heat Company, supra; Bean vs. Pioneer Min. Co., supra; Randolph Co. Paper*, 143.

Our conclusion is that the demand was made upon the only maker, and therefore the refusal of the trial judge to nonsuit was right.

Judgment affirmed.

(74 WISCONSIN, 387, 17 AM. ST. REP. 171, 5 L. R. A. 496.)

LIEBSCHER vs. KRAUS.

(Supreme Court of Wisconsin, August, 1889.)

Action upon a note. The opinion states the facts. Defendant had judgment below.

Frank J. Lenicheck and *J. C. McKenney*, for the appellant.

Winkler, Flanders, Smith, Bottum and *Vilas,* for the respondent.

ORTON, J. This action was brought on the following promissory note:

"$637.40. MILWAUKEE, January 1, 1887.

"Ninety days after date, we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

"SAN PEDRO MINING AND MILLING COMPANY,
"F. KRAUS, President."

The plaintiff demands judgment on this note against both the corporation and Frederick Kraus, as joint makers. The defendant Kraus answered that he signed the note for the said San Pedro Mining and Milling Company, as its president, and not otherwise, and that his signature was placed upon said note for the purpose of showing who executed the same on behalf of said company, and as a part of the corporation signature to the note, and for no other purpose. The plaintiff offered to prove on the trial substantially that Kraus did not sign the name of the company, but signed his own name as a joint-maker, intending to bind himself, and that this was according to the understanding of the parties, at the time. This offer was rejected, and a verdict in favor of Kraus was directed by the court. This evidence is admissible only on the ground that there is an ambiguity in the signatures to the note. If, in the law, this signing imports that both the company and Kraus are jointly bound, or that only the company is bound, there is no ambiguity and parol evidence to alter or vary this effect is inadmissible. But if, in the law, such signing imports only that both are bound, or that the company only is bound, according to the facts and circumstances in explanation of it and the intention or understanding of the parties, then there is an ambiguity, and the evidence was proper.

The contention of the learned counsel of the appellant that this signing imports that both are bound, is inconsistent with the offer of such evidence. The learned counsel of the appellant has expressed, in his brief, the true principle, as follows: "As to the question of parol evidence, the rule of law is, that such evidence cannot be admitted to vary the terms of a contract, or to show contrary intention than that disclosed by the instrument, unless there

is an ambiguity." This has been often decided to be the law by this court. *Foster vs. Clifford,* 44 Wis. 569, 28 Am. Rep. 603; *Cooper vs. Cleghorn,* 50 Wis. 113; *Hubbard vs. Marshall,* 50 Wis. 322; *Gilmann vs. Henry,* 53 Wis. 470.

There appears to be an inconsistency in cases where it is first held that such a note *ipso facto* binds the person who signed it with his official name, and yet that parol evidence might be given to make it certain. *Heffner vs. Brownell,* 70 Iowa, 591. This case is mentioned as the only one in which it has been decided that such signing binds the person as well as the corporation; but there would seem to be somewhat of an ambiguity in the opinion.

In *Bean vs. Pioneer Mining Company,* 66 Cal. 451, 56 Am. Rep. 106, it seems to have been decided that a similar note bound the company alone, but that the parol evidence was proper to explain it. No case is cited, and I can find none, where it has been decided squarely that such a note bound both the company and the person whose name appears below with the name of his office or agency, or bound the company alone, except the case of *Chase vs. Pattberg,* 12 Daly, 171, where the note was, "We promise to pay," etc., "(Signed) English S. M. Co., H. Pattberg, Manager;" and it was decided that the company was not bound, but that Pattberg was. The authorities are generally the other way. In *Draper vs. Massachusetts Steam Heating Co.,* 5 Allen, 338, the note was, "We promise to pay," etc., "(Signed) Massachusetts Steam Heating Company; L. S. Fuller, Treasurer." In *Castle vs. Belfast Foundry Co.,* 72 Me. 167, it was, "We promise to pay," etc., "at office Belfast Foundry Company; (Signed) Belfast Foundry Company, W. W. Castle, President." In *Falk vs. Moebs,* 127 U. S. 597, it was, "We promise to pay," etc., "to order of Geo. Moebs, Sec. & Treasurer, at," etc.; "(Signed) Peninsular Cigar Co., Geo. Moebs, Sec. & Treas.," and indorsed, "Geo. Moebs, Sec. & Treas." These notes were held to be unambiguous, and not explainable by parol evidence, and the notes of the companies alone.

Many other cases of similar signing are found in the above cases and in the text books. See also Mechem on Agency, section 439; 1 Randolph on Commercial paper, 188; 1 Daniel on Negotiable Instruments, sections 299-305; *Gillett vs. Newmarket Savings Bank,* 7 Ill. App. 499; *Scanlan vs Keith,* 102 Ill. 634, 40 Am. Rep. 624; *Latham vs. Houston Flour Mills,* 68 Tex. 127; Story on Agency,

sec. 154; Parsons on Notes and Bills, 312. The question comes very near, if not quite, having been decided by this court in *Houghton vs. First National Bank*, 26 Wis. 663, 7 Am. Rep. 107, where it held that an indorsement on a note not belonging to the bank by "Geo. Buckley, Cas.," he being cashier of the bank, bound the bank, and not himself. In *Ballston Spa Bank vs. Marine Bank*, 16 Wis. 120, it is held that a note signed by "J. H. Sidmore, Cash.," bound the bank alone. In *Rockwell vs. Elkhorn Bank*, 13 Wis. 653, where the bank promises to pay in the body of the note, and it is signed only by "D. D. Spencer, Cashier," it was held that the bank only was bound.

The principle of these authorities seems to be "that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent he will be personally liable; but if his agency appears with his signature, then his principal only is bound," Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word "president" to his own name, he shows conclusively that, as president of the corporation, he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix "cashier," "secretary," "president," or "agent" to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word "by" or "per" or "pro" would not add to the certainty of what is thus expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus as its president. The circuit court properly rejected the offer of parol proof, and correctly instructed the jury to find a verdict in favor of Kraus.

The judgment of the circuit court is affirmed.

NOTE.—In *Keidan vs. Winegar*, 95 Mich. 430, 54 N. W. Rep. 901, the rule, as to the admissibility of parol evidence stated in Mechem on Agency, § 443, is quoted with approval.

II.

OF THE EXECUTION OF OTHER SIMPLE CONTRACTS.

(101 UNITED STATES, [11 OTTO] 392, 2 MYER'S FED. DEC. 170.)

WHITNEY vs. WYMAN.

(Supreme Court of the United States, October, 1879.)

This was an action brought by Whitney to recover the price of certain machinery alleged to have been sold by him to defendants, Wyman, Ferry and Storrs. The defense was that the defendants, in making the purchase, acted for and in behalf of the Grand Haven Fruit Basket Company and not personally. Defendants and a number of other persons had on January 5, 1869, organized a corporation bearing that name, and on January 21st the corporation had adopted by-laws and elected directors. On January 25, defendants were elected by the directors, a "prudential committee." The articles of association were not filed with the Secretary of State until February 19, 1869, and with the county clerk until May 12, 1869. The statute provided that the corporation should not commence business until the articles were so filed.

On February 1, 1889, defendants, who were authorized by the directors to buy the machinery, wrote to Whitney saying, "Our company being so far organized, by direction of the officers, we now order from you," etc., giving a list of the machinery, and signed "Charles Wyman, Edward P. Ferry, Carlton L. Storrs, Prudential Committee, Grand Haven Fruit Basket Co." On February 10, plaintiff addressed a letter to the company acknowledging receipt of the order, saying he had already anticipated it by beginning work on the machinery and would push it with all his force. April 14, plaintiff addressed a letter to defendants enclosing the bill and stating that the machinery had been shipped. Plaintiff charged the machinery to defendants personally upon his books, and drew a draft upon them which they refused to accept. The company received the machinery and used it in its business, and its treasurer paid the freight. The company failed to pay, and plaintiff in this action sought to hold defendants personally liable. The court below instructed the jury that the letter of February 1, 1869, bound the company and not the defendants personally, if

there was then a corporation; that if it was exercising its franchise as such it was a corporation *de facto*, and the irregularities in its organization were immaterial. Verdict for defendant.

J. W. Champlin, for plaintiff in error.

M. J. Smiley, for defendants.

SWAYNE, J. (After stating the facts.) Where the question of agency in making a contract arises there is a broad line of distinction between instruments under seal, and stipulations in writing not under seal, or by parol. In the former case the contract must be in the name of the principal, must be under seal, and must purport to be his deed and not the deed of the agent covenanting for him. *Stanton vs. Camp*, 4 Barb. (N. Y.) 274. In the latter cases the question is always one of intent, and the court, being untrammeled by any other consideration, is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.

Looking at the letter of the defendants of the 1st of February, 1869, and the answer of the plaintiff of the 10th of that month, we cannot doubt as to the understanding and meaning of both parties with respect to the point in question. The former advised the latter of the progress made in organizing the corporation; that the order was given by the direction of its officers, and the letter is signed by the writers as the "Prudential Committee of the Grand Haven Fruit Basket Co.," which was the name in full of the corporation. The plaintiff addressed his reply to the "Grand Haven Fruit Basket Company," thus using the name of the corporation as the party with whom he knew he was dealing, and omitting the names of the defendants, and their designation as a committee, according to the style they gave themselves in their letter. It seems to us entirely clear that both parties understood and meant that the contract was to be, and in fact was, with the corporation,

and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Utley vs. Donaldson*, 94 U. S. 29.

But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association, as required by the statute. To this objection there are several answers. The corporation subsequently ratified the contract by recognizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. Angell & Ames. Corp. § 804, and note. The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. Id. § 635, and note. The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity. *National Bank vs. Matthews*, 98 U. S. 621. The instruction given by the court to the jury with respect to acts of *user* by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff. Angell & Ames, Corp. sec. 635.

* * * Judgment affirmed.

(156 MASSACHUSETTS, 28, 15 L. R. A. 509.)

BROWN vs. BRADLEE.

(Supreme Judicial Court of Massachusetts, February, 1892.)

Action to recover the amount of a reward. The opinion states the facts. The plaintiff recovered below.

J. M. B. Churchill, for the defendants.

C. Browne & J. J. Feeley (*J. H. Taylor*, with them), for the plaintiff.

HOLMES, J. This is an action to recover a reward which was offered in writing in the following terms:

"$2,500 reward will be paid to any person furnishing evidence

that will lead to the arrest and conviction of the person who shot Mr. Edward Cunningham, November 21, 1889.

"J. WALTER BRADLEE.
"T. EDWIN RUGGLES.
"J. ALBERT SIMPSON.
"Selectmen of Milton.

"*Milton,* Nov. 22, 1889."

The main questions reserved by the report are really questions as to the construction of this instrument, namely, whether the defendants bound themselves personally by it, and what evidence would warrant a finding that the conditions of the offer were satisfied.

On the first question, we are of opinion that the defendants are personally liable. No doubt the instrument would bind the town if made with authority and intent to bind it. *Crawshaw vs. Roxbury,* 7 Gray, (Mass.) 374; *Janvrin vs. Exeter,* 48 N. H. 83, 2 Am. Rep. 185. But the same words may bind two parties: the agent, because in their literal sense they purport to bind him; the principal, because he is taken to have adopted the name of the agent as his own for the purpose of the contract. *Byington vs. Simpson,* 134 Mass. 169, 45 Am. Rep. 314 (*post,* p. ——); *Calder vs. Dobell,* L. R. 6 C. P. 486. The purport of the words used in this case is that the promise contained in the body of the paper is made by the signer.

The only question is who is the signer? Do the defendants, by adding their official designation, take away from their names their ordinary significance as proper names, and make of their collective signatures a composit unit, which means the town of Milton and nothing else? We think not. But for the words, "Selectmen of Milton," the promise would be in the usual and proper form for a personal undertaking. *Wentworth vs. Day,* 3 Metc. (Mass.) 352, 37 Am. Dec. 145; *Besse vs. Dyer,* 9 Allen (Mass.) 151, 85 Am. Dec. 747; *Lancaster vs. Walsh,* 4 M. & W. 16; *Lockhart vs. Barnhart,* 14 M. & W. 674; *Thatcher vs. England,* 3 C. B. 254; *Tarner vs. Walker,* L. R. 1 Q. B. 641, L. R. 2 Q. B. 301. If it contained express words of personal promise, and the corporation was a private corporation, or the agents were not public officers, the mere addition of their office would not exonerate them. *Simonds vs. Heard,* 23 Pick. (Mass.) 120, 125, 34 Am. Dec. 41; *Fullam vs. West Brookfield,* 9 Allen, (Mass.) 1, 4; *Tucker Mfg. Co. vs. Fairbanks,* 98 Mass. 101, 104.

The only argument which can be relied on for a different con-

clusion here is that the defendants were public officers, and that a more liberal rule prevails with regard to them. It has been doubted how far there is such a difference with regard to agents or officers of a town; *Simonds vs. Heard, supra; Hall vs. Cockrell,* 28 Ala. 507; *Providence vs. Miller,* 11 R. I. 272, 23 Am. Rep. 454; and these cases show very plainly, if authority for the proposition is needed, that such officers will bind themselves personally if they purport to do so. As a test of what the defendants have purported to do by the literal meaning of their words, suppose that their offer had been under seal, We think it would have been impossible to say that the only meaning of the signature was the town of Milton. See *Codding vs. Mansfield,* 7 Gray, (Mass.) 272, 273.

Perhaps our conclusion is a little strengthened by the consideration that, so far as appears, the defendants had not authority to bind the town for more than $500. Pub. Sts. c. 212, § 12. For although, of course, an agent does not make a promise his own by exceeding his authority if it purports to bind his principal only (*Jefts vs. York,* 4 Cush. [Mass.] 371, 50 Am. Dec. 791), still, when the construction is doubtful, the fact that he has no authority to bind the supposed principal is a reason for reading his words as directed toward himself. *Hall vs. Cockrell, supra.* (Omitting other considerations.)

Judgment on the verdict.

NOTE.—See *Knight vs. Clark, ante,* p. 434.

(8 MEESON & WELSBY, 834.)

HIGGINS vs. SENIOR.

(English Exchequer of Pleas, June, 1841.)

Special assumpsit. The opinion sufficiently states the case.

Dundas and *Crompton,* for plaintiff.

Cresswell, John Henderson and *R. Denman,* for defendant.

PARKE, B. The question in this case, which was argued before us in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is

competent for the defendant to discharge himself, on an issue on the plea of non-assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not; and that the rule for a new trial must be discharged.

There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, (*Garrett vs. Handley*, 4 B. & C. 644; *Bateman vs. Phillips*, 15 East, 272), and charge with liability on the other, (*Paterson vs. Gandasequi*, 15 East, 62), the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange (*Sowerby vs. Butcher*, 2 C. & M. 371; *Letevre vs. Lloyd*, 5 Taunt. 749), signed by a person, without stating his agency on the face of the bill; but as to other written contracts, namely, the cases of *Jones vs. Littledale*, 6 Ad. & Ell. 486; 1 Nev. & A. 677, and *Magee vs. Atkinson*, 2 M. & W. 440. It is true that the case of *Jones vs. Littledale*, might be supported on the ground that the agent really intended to contract as principal, but Lord DENMAN, in delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." And this is also laid down in Story on Agency, § 269. *Magee vs. Atkinson*, is a direct authority, and cannot be distinguished from this case.

The case of *Wilson vs. Hart*, 7 Taunt. 295; 1 Moore, 45, which was cited on the other side, is clearly distinguishable. The con-

tract in writing was, on the face of it, with another person named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got posession of them, it was held, on the principle of *Hill vs. Perrott*, 3 Taunt. 274, and other cases, that the defendant was liable; and as is observed by Mr. Smith, in the very able work to which we were referred (Leading Cases, vol. II, page 125), that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant not to discharge Read.

Rule discharged

BOOK IV.

OF THE RIGHTS, DUTIES AND LIABILITIES ARISING OUT OF THE RELATION.

CHAPTER II.

OF THE DUTIES AND LIABILITIES OF THE AGENT TO HIS PRINCIPAL.

I.

LOYALTY TO HIS TRUST.

(11 MICHIGAN, 222.)

THE PEOPLE vs. TOWNSHIP BOARD OF OVERYSSEL.

(Supreme Court of Michigan, April, 1863.)

Application for *mandamus* to compel the township to issue bonds to pay for work done under a contract to improve a harbor. Defense that the contract was void because four of the Board who let the contract were among the contractors for doing the work.

Balch & De Yoe, for respondents.

A. Russell, for relators.

MANNING, J. Four of the relators, who took the contract to build the piers, were members of the board of freeholders organized under the act for the purposes therein mentioned, and that let the contract on behalf of the public. So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same

transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds on in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. Hence, the law will not permit an administrator to purchase at a public sale by himself, property of the estate on which he has administered; or a guardian the property of his ward, when sold by himself.

All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interests, and not their own. And a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge cannot hear and decide his own case, or one in which he is personally interested. He may decide it conscientiously and in accordance with law, but that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. For these reasons we hold the contract we are asked to enforce by *mandamus* void as against public policy. See *Clute vs. Barron*, 2 Mich. 192; *Dwight vs. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Ingerson vs. Starkweather*, Walk. (Mich.) Ch. 346; *Beaubien vs. Poupard*, Har. (Mich.) Ch. 206; *Walton vs. Torrey*, Har. Ch. 259; *Perkins vs. Thompson*, 3 N. H. 144; *Obert vs. Hammel*, 3 Harrison (N. J.) 74; *Lazarus vs. Bryson*, 3 Bin. (Pa) 54.

We think it no exception to the rule we have stated, that all the the contractors were not members of the board of freeholders, or that those who were members were a minority of the board. The rule would not amount to much if it could be evaded in any such way. It might almost as well not exist, as to exist with such an exception. The public would reap little or no benefit from it.

Being against the relators on this part of the case, I think it unnecessary to notice the other points made on the argument.

The *mandamus*, I think, should be denied, with costs.

CHRISTIANCY, J., delivered a concurring opinion. CAMPBELL concurred in the result, but held the contract voidable rather than void.

(108 ILLINOIS, 39, 48 AM. REP. 541.)

DAVIS vs. HAMLIN.

(Supreme Court of Illinois, November, 1883.)

Bill to declare that Davis held a certain lease in trust for Hamlin. Davis, who was the confidential agent of Hamlin, the lessee of a theater, shortly before Hamlin's lease expired secretly procured a lease of the premises for a new term to himself, denying to Hamlin that he was competing for the lease. Plaintiff had judgment below.

Egbert Jamieson and *L. W. Pierce,* for appellants.

Leonard Swett and *Quigg & Tuthill,* for appellee.

SHELDON, C. J. Under the facts in this case the only question arising is, whether Hamlin, by reason of Davis' agency and confidential relation to him, is entitled to the benefit of the lease executed by Borden to Davis.

In the employment of an agent, the principal bargains for the disinterested skill, diligence and zeal of the agent for his own exclusive benefit. Upon entering into the employ of Hamlin, there rested upon Davis the duty of fidelity to his employer's interest, and of acting for the furtherance and advancement of the business in which he was engaged, and not in its injury. We view the whole conduct of Davis in regard to the lease in question as violative of the duty of the relation in which he stood toward Hamlin. His first offer to rent the premises from Borden, about December, 1881, was an act hostile to the interest of his employer. He offered Borden a rent which was nearly $5,000 in excess of the rent which Hamlin was then paying.

Borden knew that this was an offer made upon an exact knowledge of the profits of the business, which Davis, from his employment, had peculiar means of knowing, and the natural effect would be to cause Hamlin to pay an enhanced rent when he should come to ask for a renewal of his lease. Davis violated the duty of his rela-

tion in concealing from Hamlin that he was attempting to get the lease. Davis excuses his denial to Hamlin of such attempt by saying this was on January 17, and that it was true that at that time he was not making such an attempt, but had given it over, not up to that time having received any response from Borden to Davis' offer to rent, made on December 1st, and that he was then, on January 17, making, or had made, preparations to go into another business. Taking this to be so, we find Davis only two days later, January 19, in the act of negotiating for the lease, and making an offer to Borden for the lease which the latter took time to consider. Now Davis knew that it was of vital importance to the interest of Hamlin that the latter should get a renewal of his lease; that Hamlin was most anxious to ascertain whether Davis—who alone, with Hamlin had exact knowledge of the profits of the business—was in competition for the lease; and from Davis, only two days before, denying that he was competing for the lease, Davis knew, on January 19, that the belief was resting on Hamlin's mind, from what Davis had told him two days before, that Davis was not a competitor for the lease. Under these circumstances Davis ought to have disabused the mind of Hamlin of the impression, which Davis had caused, that the latter was not attempting to get the lease, and have informed Hamlin of what the fact was, to give the latter the opportunity to act accordingly, and Davis' not doing so was a breach of good faith toward his employer.

The obtaining of the lease by Davis amounted to a virtual destruction of his employer's whole business at the termination of the old lease, under which the latter was holding. By some ten years of labor Hamlin had built up a business of a very profitable character. There was a good will attached to it, which was valuable. Hamlin was intending to make it a life-time business. Sustaining this lease to Davis at the expiration of Hamlin's lease, April 18, 1883, all this business would come to an end, and pass, good will and all, from Hamlin, the employer, into the hands of Davis, the employé. And this would have been accomplished by the means of a renewal lease obtained by a confidential agent, in violation of the duty of his relation, and acquired, presumably, because of peculiar means of knowledge of the profitableness of the business, afforded him by the confidential position in which he was employed. A personal benefit thus obtained by an agent, equity will hold to inure for the benefit of the principal.

Public policy, we think, must condemn such a transaction as that

in question. To sanction it would hold out a temptation to the agent to speculate off from his principal to the latter's detriment. Davis very well knew that his employer would be willing to pay a much higher rent than that at which he obtained the lease, and that he could dispose of the lease to Hamlin at a large profit to himself, and such means of knowledge was derived from his position as agent. If a manager of a business were allowed to obtain such a lease for himself, there would be laid before him the inducement to produce in the mind of his principal an under-estimate of the value of the lease, and to that end, may be, to mismanage so as to reduce profits, in order that he might the more easily acquire the lease for himself.

It is contended by the appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that this was but the specific employment to engage amusements for the theater, and that he was an agent only within the scope of that employment; that Hamlin having a lease which would expire April 16, 1883, had no right or interest in the property thereafter, and that Davis in negotiating for the lease did not deal with any property wherein Hamlin had any interest, and that such property was not the subject matter of any trust between them. Although there was here no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal, which courts of equity have recognized as an interest of value, secretly to interfere with which, and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. There was the good will of the business, which belonged to the business as a portion of it, and this the agent got for himself.

It is further argued that the relation here between Hamlin and Davis was that of master and servant, or employer and employee, and that the rule has never been applied to that relation as a class, and that the classes coming within that doctrine are embraced within the list of defined, confidential relations, such as trustee and beneficiary, guardian and ward, etc. The subject is not comprehended within any such narrowness of view as is presented on appellant's part. In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation. Of this principle BISPHAM says: "The rule

under discussion applies not only to persons standing in a direct fiduciary relation toward others, such as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise." Bisph. Eq. sec. 93. In *Greenlaw vs. King*, 5 Jur. 19, Lord Chancellor COTTENHAM, speaking of this doctrine says: "The rule was one of universal application affecting all persons who came within its principle, which was that no party could be permitted to purchase an interest when he had a duty to perform which was inconsistent with the character of a purchaser." "It is the duty of a trustee," said Lord BROUGHAM, in *Hamilton vs. Wright*, 9 Cl. & Fin. 111, "to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust." And on page 124: "Nor is it only on account of the conflict between his interests and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust."

Although this was said of a trustee, we think it may be equally said here with respect to Davis and the business which he was employed to manage. The rule we apply as to its broadness in extent is aptly expressed in the American note to *Keech vs. Sandford*, 1 Lead. Cas. in Eq. 53, as follows: "Wherever one person is placed in such relation to another by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

The view which we have above expressed we believe to be in accordance with the well established principles of equitable jurisprudence. See *Devall vs. Burbridge*, 4 W. & S. (Pa.) 305; *Hill vs. Frazier*, 22 Pa. St. 320; *Fairman vs. Bavin*, 29 Ill. 75; *Gilman, Clinton & Springfield R. Co. vs. Kelly*, 77 Id. 426; *Bennett vs. Vansyckle*, 4 Duer, 462; *Gillenwaters vs. Miller*, 49 Miss. 150; *Grumley vs. Webb*, 44 Mo. 446, 100 Am. Dec. 304.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

NOTE.—See, also, *Vallette vs. Tedens*, 122 Ill. 607, 3 Am. St. Rep. 502.

(22 NEW YORK, 327, 78 AM. DEC. 192.)

GARDNER vs. OGDEN.

(New York Court of Appeals, December, 1860.)

Plaintiff, who lived in New York, owned real estate in Chicago, and placed it in the hands of Ogden, Jones & Co., real estate agents there for sale. Smith and Hathaway were clerks of Ogden, Jones & Co. While Ogden was absent in Europe, Hathaway wrote to plaintiff, in the name of the firm, saying that they had an offer from Mr. Henry Smith, for the land of $7,500, and that it was doubtful if more could be obtained. Their relation to the firm was not disclosed. Plaintiff accepted the offer relying upon the advice given, and a deed from plaintiff and a note signed by Smith & Hathaway secured by a mortgage back upon the land signed by Smith and wife were exchanged. Before receiving the deed but after the acceptance of the offer, Smith sold portions of the lots for $8,250, and another portion for $1,000. A few months afterward, plaintiff notified Ogden, Jones & Co. of his dissatisfaction with the sale. This action was brought charging Ogden as a party to the fraud, asking that the conveyance be set aside or that Smith and Ogden should pay the highest price which the land had reached. Plaintiff had judgment and defendants appealed.

William Curtis Noyes, for appellant.

John H. Reynolds, for respondents.

DAVIES, J. (After disposing of a question of jurisdiction). It is appropriate here to examine into the nature and character of the complaint in this action, and the grounds upon which it is sought to make the respective defendants liable. The defendant Ogden is charged with a fraud in having made sale, by himself or his partners, of the plaintiff's lands, at a price far below their actual value, and when they knew that they were selling in an advancing market; that the firm, including Ogden, was interested in the purchase by Smith and Hathaway, their clerks, and that the sale was made to them to defraud the plaintiff; and the plaintiff claims to recover of Ogden the highest price which the land has attained, by reason of his fraudulent disposition of it. The plaintiff's ground of claim against Smith is, that he stood in such rela-

tion of confidence to the plaintiff that, in making the purchase, the law judges that he holds the subject-matter of it as the plaintiff's trustee, and that the plaintiff can call him to account as such.

This the plaintiff can do, if such relation of confidence subsists, by requiring a reconveyance of the property, if that be practicable, with an account and payment of the rents and profits accruing during the time it was held by the trustee, or if that is not practicable, by calling on the trustee to account and pay over to his *cestui que trust* all that he has realized or ought by due diligence to have realized from the trust estate. In the present case, the plaintiff has elected to regard Smith as his trustee; and his complaint as to him, and the decree of the special term proceeds on this bsais. The plaintiff, therefore, elects to affirm the sale made to Smith. He cannot, *uno flatu*, affirm it as to him, and disaffirm it as to the defendant Ogden. It is difficult to see how, under the provisions of section 167 of the code, these causes of action may be united in the same complaint. Although it may be said that both causes of action arise out of the same transaction, towit, the sale of the plaintiff's lands to the defendant Smith, yet the cause of action against Ogden is for an injury to the plaintiff's property, while that against Smith is a claim against him as a trustee by operation of law.

The causes of action joined in this complaint do not affect both of the parties defendant. Ogden is not affected by, or in any way responsible for, Smith's acts as the plaintiff's trustee, and the complaint does not profess to make him liable therefor. So Smith is not sought to be made responsible for the fraudulent acts of Ogden. On the plaintiff's own showing, he has separate and distinct causes of action against each of the defendants and which cannot be joined under the code. The issues are separate; the relief prayed against each is distinct and different, and the proofs relied on to maintain each issue are of an entirely dissimilar character.

We have looked into the testimony in the case to ascertain if the charge of fraud against the defendant Ogden is sustained by the testimony. As to any personal fraud, it is clear he was not guilty of any, for he was absent in Europe during all the time the negotiations of his firm with Smith, for the sale of the plaintiff's lands were carried on, and did not return until about the time the complaint in this action was verified. The plaintiff entirely failed to show any fraud on the part of the firm or the defendant Ogden,

of such a character as would make them responsible in damages for the sale of the lands to Smith.

The testimony fully sustains the position that, at the time of the sale, the price paid, or agreed to be paid, was fair and adequate, and that the purchase-money was adequately secured, and it fails to show that Ogden's firm, or any member of it, had any interest in the purchase. The affirmance of the sale by the plaintiff is a complete answer to the claim for damages against the firm for fraud in making the sale. In the case of *Massie vs. Watts*, 6 Cranch, (U. S.) 148, one Anderson, who made the survey which, it was alleged. Massie had located in his own name instead of that of his principal, was made a party defendant, charging him with fraud in making the survey. On the hearing, the complaint was dismissed, with costs, as to Anderson, and a decree made against Massie, which was affirmed by the supreme court on appeal.

A proper disposition of this cause, as to the defendant Ogden, would have been to have dismissed the complaint as to him. The supreme court, at general term, having reversed the judgment of the special term and granted a new trial, and the plaintiff having appealed therefrom, and stipulated that, if it should be affirmed, judgment absolute might be rendered against him, it is now proper to affirm that order as to the defendant Ogden, and render judgment absolute in his favor, by dismissing the complaint as to him, with costs.

It only remains now to consider the cause of action against the defendant Smith. It proceeds upon the ground that Smith stood in such relation of confidence to the plaintiff that the purchase made by him was made as the plaintiff's trustee, and that he can derive no benefit therefrom.

This leads to an examination of the main and important question in the case. It is to be observed in the commencement that Ogden, Jones & Co. were the conceded agents of the plaintiff; as such, they owed a duty to him to manage and dispose of his property to the best advantage. It is admitted by the answer that Hathaway and the defendant Smith were clerks of the firm during the years 1852, 1853, and up to July 12, 1854. As such they of course had access to the correspondence of the firm, were well acquainted with the plaintiff's urgency to sell, his motives for so doing, and all the facts and circumstances connected with the property known to the plaintiff's agents; and as the clerks of the firm, they owed the same duty to the plaintiff. This view is much

strengthened by the circumstance that all the correspondence with the plaintiff relating to the sale was carried on by Hathaway in the name of the firm; though, in the important letter of October 26, 1853, his name does not appear as the writer. It was written, apparently, by the firm, and signed in their name.

A circumstance is disclosed in the proof, which tends strongly to the inference that Hathaway was either interested in this purchase from the beginning or intended so to be. I am strongly impressed with the conviction that he was originally a party in interest. It appears that the plaintiff and his sister, Mrs. Hall, were the owners jointly of block No. 1, Carpenter's addition, in Chicago, and of lots 4 and 5 in block 17; that the firm of Ogden, Jones & Co. had charge of this property, and in the spring of 1852, they made partition thereof between Mrs. Hall and the plaintiff, valuing each share at five thousand five hundred and sixty dollars. Hathaway, in the letter of January 13, 1854, informs the plaintiff that he had become the owner of Mrs. Hall's lots; and this circumstance presents a motive on his part to become the owner of, or interested in, the share of the lots owned by the plaintiff. In addition to this, he became equally bound with Smith for the payment of the purchase money, and this, coupled with the conceded fact that he is now interested with him, leads to the inevitable conclusion that he was so originally, or, at least, intended to be.

If Ogden, Jones & Co. had become the purchasers, instead of their clerks Smith and Hathaway, what would have been the plaintiff's rights in the premises? The rule is clearly laid down by that learned and eminent writer, Lord ST. LEONARDS, in his work on vendors and purchasers (see Sugden on Vendors, 13th ed. 566); he says: "It may be laid down as a general proposition that trustees, who have accepted the trust (unless they are nominally such, as trustees to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any person who being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restriction which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information,

and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*"

In *Fox vs. Mackreth,* 2 Bro. C. C. 400, it was held by the master of the rolls (afterwards Lord Kenyon), and Lord Chancellor THURLOW, that a trustee for the sale of estates for the payment of debts, who purchased them himself by taking undue advantage of the confidence reposed in him by the plaintiff, and who resold the same premises at a greatly advanced price, should be regarded as a trustee, as to the sums produced by such second sale, for the original owner. This decree was affirmed in the House of Lords in March, 1791. *Mackreth vs. Fox,* 4 Brown P. C. 258. Soon after this, Mackreth the delinquent trustee, smarting under the just principles of law laid down by the courts, sought to avenge himself for the wrong which he imagined had been done to him, by challenging Sir John Scott, afterwards Lord Eldon, one of the leading counsel for Fox, the plaintiff. No notice was taken of this challenge by Sir John Scott: Twiss's Life of Lord Eldon, Vol. 1, p. 218. And this case has ever remained as a leading authority, and one of peculiar interest.

In *Hall vs. Noyes,* 3 Bro. C. C. 483, a bill was filed by a widow of a *cestui que trust,* ten years after the sale of trust property by three trustees to one, and the purchaser was held a trustee for the widow. And it is a fact to be noted that the price given by the trustee was more than could have been got from anyone else.

In *Crowe vs. Ballard,* 3 Bro. C. C. 117, the lord chancellor says: "Ballard undertakes to sell a legacy, and pretends he took great pains so to do; then he buys it himself. This is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy."

In *Whichcote vs. Lawrence,* 3 Ves. 740, the lord chancellor says, "the real proposition, which is very plain in point of equity, and a principle of clear reasoning, is that he who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore, a trustee to sell shall not gain any advantage by being himself the person to buy."

This principle was acted on by Lord KING, in *Keech vs. Sanford,* Sel. Cas. Ch. 61, October 31, 1726. He there said: "It might seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that

the rule precluding him from purchasing should be strictly pursued, and not in the least relaxed."

In *Whelpdale vs. Cookson*, 1 Ves. sen. 8, Lord Chancellor HARDWICK would not allow a purchase by a trustee to stand, although another person, being the highest bidder, bought it for him at a public sale. He said that he knew the dangerous consequences of permitting it; and it was not enough for the trustee to say you cannot prove any fraud, as it is in his power to conceal it. The whole doctrine is very fully reviewed by Lord ELDON, chancellor, in *Ex parte James*, 8 Ves. 337.

It were useless to cite all the authorities in the books on this point. A few additional ones, as being of peculiar significance and importance, will be referred to. Notice particularly should be taken of the case of *York Buildings Association vs. Mackenzie*. It first appeared in 8 Brown P. C. by Torn in Appendix 42; but has since been reported in 3 Paton, (4, Sec. App. Cas.) 378.

Chancellor KENT, in *Davoue vs. Fanning*, 2 Johns. Ch. 252, says of it that it is a case too important to be omitted. He says that it is a complete vindication of the doctrine he applied in that case, and that considering the eminent character of the counsel who were concerned in that case, and who had since filled the highest judicial stations, and the ability and learning which they displayed in the discussion, it is, perhaps, one of the most interesting on a mere technical rule of law, that is to be met with in the annals of our jurisprudence. He added that the reasons of the House of Lords, for setting aside the sale, are not given, and that we are left to infer them from the arguments upon which the appeal was founded. They have now appeared in the report in 3 Paton.

It is stated by the reporter, in a note (1 Macq. 481), that the argument of this case lasted sixteen days, at two sessions of parliament (1794 and 1795). Judgment was given on the seventeenth. Lord LOUGHBOROUGH was, indeed, chancellor then; but the tradition is that Lord THURLOW, (who has recently delivered the opinion in *Fox vs. Mackreth*, 2 Bro. C. C. 400), took the chief part in the hearing and deliberation. A person present at the time the judgment was pronounced, says, in a note to the reporter: "I have a very strong recollection of the very impressive speech of Lord THURLOW on the appeal of *York Buildings Co. vs. Mackenzie*. I was present. Lord LOUGHBOROUGH, the chancellor, spoke after Lord THURLOW." The appellants were an insolvent company, and

their estate was sold by the order of the court of session, at a public judicial sale, to satisfy creditors.

The course of such sales is to set up the property at a value fixed upon by the court, which is called the upset price, and which is fixed on information obtained and communicated to the court by the common agent of the court, who has the management of all the outdoor business of the cause. The respondent in the case was the common agent, and he purchased for himself at the upset price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for buildings and improvements. There was no question as to the fairness or integrity of the purchase. The object of the appellants was to set aside the sale, on the ground that the purchaser was the common agent in behalf of all parties to procure information and attend the sale, and stood in the nature of a trustee, and therefore disabled to purchase.

On the part of the appellants, it was contended that the sale in question was *ipso jure,* void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a purchaser. "The office of common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini,* imports the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law; that it is of no moment what the particular name or description, whether of character or office, situation or position, is, on which the disability attaches." "*Tutor, ait Paulus, rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt;*" Lib. 3 sec. 7 ff. De Contrac. Emp., etc. The reason of this law is implied in the nature of the cases to which it is extended. Its energy does not consist in a distinction of mere words that a tutor cannot be both seller and buyer, neither does it rest on another applicable enough adage, "*Nemo potest in rem suam auctor esse.*"

This *sententia* of the Roman juris-consult is, that the tutor cannot buy his pupil's estate because he has a trust and charge for his pupil, and therefore it is that the law is extended *ad similia,* and to all, *qui negotia aliena gerunt.* By this principle, as the sound and substantial reason of the law, is to be interpreted that other text of the Pandects which says: "*Item ipse tutor, et emptoris et venditoris officio fungi non potest.*" Lib. 5 sec. 7 ff. De Auct. and

Cons. Tut. and Cur. These views were not controverted by the counsel for the respondent; but they insisted that the sale could be maintained on other grounds. The opinions in the house of lords were given by Lords THURLOW and LOUGHBOROUGH. The former said that all the gentlemen admit that it was the duty of the agent to carry on the sale to the utmost advantage for the benefit of the creditors and those interested in the residue; and taking it to be so, one side said, that being your situation, it is utterly impossible for you to perform that duty in such a manner as to derive an advantage to yourselves.

He said this seems to be a principle so exceedingly plain that it is, in its own nature, indisputable; for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it. In these views the Chancellor concurred, and the sale was set aside. Lord ELDON and Sir W. GRANT designate this as the great case, and frequently refer to it; and Lord ST. LEONARDS, in his work on Vendors and Purchasers, vol. 3, p. 240, calls it likewise the great case, and frequently refers to it.

In *Jeffrey vs. Aiken*, 4 Sess. Cas., 1st ser., 729, decided in Scotland in June, 1826, the lord ordinary observed, it is impossible to hold that the seller can also be the buyer of the subject, after the judgment of the house of lords in the case of *York Buildings Company vs. Mackenzie.*

In *Hughes vs. Watson* (not reported), decided also in Scotland, January 20, 1846, the same rule as laid down in Mackenzie's case was reiterated and adhered to.

Lord JEFFRY said: "The principle involved in this case is a very familiar and general one in our laws. No person can be actor in *rem suam.* The stringency of the maxim has been ruled and held settled by the house of lords in the case of *Mackenzie.* * * * It is now *presumptio juris et de jure,* that where a person stands in these inconsistent relations of both buyer and seller, there are dangers, and it is not relevant to say that it is impossible there could be any in the particular case. I should be sorry to think that any doubt was thrown on this rigorous principle, which has been established both here and in the other end of the island." The whole subject is elaborately reviewed in the case of the *Aberdeen R. R. Co. vs. Blaikie Brothers,* 1 Macq. 461, decided in the house of lords, July 20, 1854.

Lord CRANWORTH, in his opinion, says: "An agent has duties

to discharge of a fiduciary character toward his principal; and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even, at the time, have been better. But still, so inflexible is the rule, that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

In these views Lord BROUGHAM concurred, p. 483. To the same point may be cited *Lewis vs. Hillman*, 3 H. L. Cas. 607, 629, 630. In *In re Bloyes' Trust*, 1 Macn. & G. 488, at p. 495, the rule is declared clearly and emphatically.

The same line of decision in this state has been uniform, and the cases are numerous where it has been recognized, affirmed, and rigorously applied. It would appear to have been first enunciated in the supreme court in *Bergen vs. Bennett*, 1 Cai. Cas. 19, 2 Am. Dec. 281, per KENT, J. It was distinctly recognized in that case as a sound and established rule. See pp. 19, 20. It received the unequivocal indorsement of the Court of Errors in *Munro vs. Allaire*, 2 Cai. Cas. 183, 2 Am. Dec. 330.

BENSON, J., in delivering the opinion of the court, says: "It is a principle that a trustee can never be a purchaser; and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud and those dangerous consequences which would ensue if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustees should be the only persons of all mankind who may not purchase, yet, for the very obvious consequences, it is proper that the rule should be strictly pursued, and not in the least relaxed."

Chancellor KENT, in *Davoue vs. Fanning*, 2 Johns. Ch. 252, says that he cannot but notice the precision and accuracy with which the rule and the reason of it are here stated.

The next case in which this rule is affirmed is that of *Jackson vs. Van Dalfsen*, 5 Johns. 43, in the supreme court. The whole subject received a most elaborate and searching examination by Chancellor KENT, *Davoue vs. Fanning*, 2 Johns. Ch. 252. The authorities are fully and carefully reviewed, and the powers of his great mind and his varied learning were brought to bear upon this discussion. It is the great case in our courts on this subject, and it will bear a favorable comparison with any other examination of this question. It settled the rule for this state, and has been recognized and adopted as authority by many of the courts of the sister states.

In harmony with these views are the cases of *DeCaters vs. LeRay de Chaumont*, 3 Paige, 178; *Slade vs. Van Vechten*, 11 Id. 26; *Poillon vs. Martin*, 1 Sandf. Ch. 569; *Jewett vs. Miller*, 10 N. Y. 402, 61 Am. Dec. 751; *Van Epps vs. Van Epps*, 9 Paige, 237; *Torrey vs. Bank of Orleans*, 9 Id. 649, s. c. 7 Hill, 260; *Hawley vs. Cramer*, 4 Cow. 717; *Dobson vs. Racey*, 8 N. Y. 216; *Moore vs. Moore*, 5 Id. 256.

This subject was very elaborately discussed in the case of *Michoud vs. Girod*, 4 How. (U.S.) 503. The very able opinion of Mr. Justice WAYNE leaves nothing new to be said. It contains a reference to and review of the cases and text writers bearing upon the question. Interesting cases on this question may also be found in *Beeson vs. Beeson*, 9 Pa. St. 284; *Hill vs. Frazier*, 22 Id. 320; *Rosenberger's Appeal*, 26 Id. 67; and *Garrard vs. Pittsburg & C. R. R. Co.*, 29 Id. 154.

It is undeniable, from these authorities, that if the purchase in this case had been made by the firm of Ogden, Jones & Co., it could not be sustained. Does the same principle apply to the purchase made by Smith, their clerk? It is not perceived upon what substantial ground a distinction can be drawn. Whatever duty his principals owed to the plaintiff, he equally owed the same. The rule, as we have seen, as laid down by Sugden, and which the authorities sustain, is that the disability extends to all persons who, being employed or concerned in the affairs of another, acquire a knowledge of his property. Now, it is undeniable, that Hathaway and Smith were employed or concerned in the affairs of the plaintiff-

iff relating to these lands, and acquired knowledge concerning them.

The defendant Smith was the clerk, or assistant, of his principals. He was their agent, and employed in and about their business. Whatever disabilities they labored under equally attached to him. It would work an entire abrogation of the rule to hold the principal subject to the operation of this rule, and exempt his clerks and agents from its effect. It would be opening the door to its evasion, so that it would lose all of its vitality and virtue. The courts have not so dealt with the application of this rule. It has been held that the partners in business of an assignee in bankruptcy are equally disqualified from purchasing as the assignee himself: *Ex parte Barnett*, 7 Jur. 116. It has been held to disqualify the solicitor to a commission in bankruptcy from becoming a purchaser at a sale of the bankrupt's effects: *Owen vs. Foulkes*, 6 Ves. 630, note *b; Ex parte James*, 8 Id. 337; *Ex parte Lindwood* and *Ex parte Churchill*, before Lord ROSSLYN, cited 8 Id. 343; *Ex parte Bennett*, 10 Id. 381.

The precise point now under consideration arose before Vice Chancellor SANDFORD, in *Poillon vs. Martin*, 1 Sandf. Ch. 569, where he held that the clerk of an attorney was as much prohibited from purchasing from a client as the attorney himself; that the principle of the rule extended as well to him as to the attorney himself.

I think this is the spirit of all the authorities, and that the honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation not only the agent himself, but those in his immediate employ, and who are engaged in the transaction of his business, which is necessarily the business of the agent's principal. It cannot be disguised that this sale was negotiated by one clerk with another clerk of the plaintiff's agents. All the mischiefs which the rules adverted to were designated to prevent are apparent in this case.

Assuming that it has been shown that the purchase made by Smith is obnoxious to the objections which have been urged, it follows that the plaintiff is entitled to a re-conveyance of his lands. But it appears that Smith, by his own act, in selling a portion of the lands, is incapable of doing that equity which the law commands, it follows that the plaintiff is entitled to the proceeds of such sales. The decree, or judgment, of the special term was,

therefore, correct. in requiring him to reconvey to the plaintiff all such portions of the lands as remain unsold, and to account to him and pay over the proceeds of all those parts which have been sold. We see no objection which Smith can properly make to that part of the decree which gives to him the election to pay to the plaintiff the ascertained value of the plaintiff's lands in lieu of such reconveyance and accounting.

The order at the General Term, granting a new trial, so far as it relates to the defendant Smith, is reversed, and the judgment of the Special Term, as to him, affirmed with costs. And the order at the General Term, granting a new trial as to the defendant Ogden, is affirmed; and in pursuance of the plaintiff's stipulation, judgment absolute is rendered against him in favor of the defendant Ogden, by the dismissal of the complaint against him, with costs.

All the judges concurred. Ordered accordingly.

NOTE.—See, also, *Dutton vs. Willner*, 52 N. Y. 312; *Dodd vs. Wakeman*, 26 N. J. Eq. 484; *Lafferty vs. Jelley*, 22 Ind. 471; *Ringo vs. Binns*, 10 Pet. (U. S.) 269. The rule which forbids an agent from dealing with himself on his principal's account, cannot be defeated by usage. *Robinson vs. Mollett*, L. R. 7 H. L. 802; *Butcher vs. Krauth*, 14 Bush. (Ky.) 713.

(133 MASSACHUSETTS, 415.)

GREENFIELD SAVINGS BANK vs. SIMONS.

(Supreme Judicial Court of Massachusetts, November, 1882.)

Action to recover damages for breach of duty as agent. The opinion states the facts.

A. L. Soule and *A. De Wolf*, for defendant.

W. S. B. Hopkins and *J. A. Aiken*, for the plaintiff.

W. ALLEN, J. The defendant was authorized and instructed by the plaintiff bank to sell, for its benefit, its rights in the new stock in a national bank, and undertook the duty. In making the sale, he acted as the agent for the plaintiff to sell the specified property, and not as trustee. The facts that he was the treasurer of the plaintiff, and that, as one of the trustees and a member of the finance committee, he took part in authorizing himself as treasurer

to sell the rights, do not tend to show that, in making the sale, he acted as a trustee or a member of the committee, and not as agent.

In exercising his functions as agent, it was the duty of the defendant, and his promise was implied to use reasonable fidelity, diligence and skill to sell to the best advantage of his principal. His authority was to sell for not less than a certain price, and his duty was to sell for as high a price as could be obtained by the exercise of reasonable diligence and skill. In executing this duty, he immediately upon receiving authority, sold the rights to himself and other members of the committee which had authorized the sale, and who were all also directors in the national bank, at the minimum price authorized, without offering the stock to others, or making any attempt to find purchasers at a higher price. The report finds that the rights sold for thirty dollars a right, had a cash value of forty-five dollars each, and would have realized that value in cash if properly exposed for sale. The court properly ruled that such acts, without proof of express fraud, were fraudulent in law, and that the plaintiff had a right to recover damages for the loss caused by them.

It appeared that the record of the doings of the finance committee authorizing the sale was read and approved at a meeting of the trustees, and that the amount received for a sale of the rights was entered on the plaintiff's cash-book by the defendant, and the defendant contends that the judge erred in not ruling, as matter of law, upon this evidence, that the plaintiff had affirmed and ratified the transaction. But we think that the refusal so to rule was clearly right. The vote was the authority under which the defendant acted, and it does not appear that the attention of the trustees was called to the entry upon the cash-book, or that any action was taken in regard to it.

The rule of damages laid down by the judge, that it was the difference between the sum for which the rights were sold and their cash value at the time of the sale, was correct. The plaintiff was not obliged to return the money, or to repurchase the rights, but may recover the actual damages occasioned to it by the want of fidelity and diligence of the defendant. But this does not include dividends paid on the shares since the sale, and there was error in including them in the damages assessed. It appears upon the report that the plaintiff is entitled to recover $1,050, and interest thereon from the time of the sale, January 26, 1880. If it

remits so much of the damages as exceeds that amount, the entry will be judgment affirmed; otherwise, verdict set aside and a new trial ordered as to damages only.

Ordered accordingly.

(104 INDIANA, 562.)

ROCHESTER vs. LEVERING.

(Supreme Court of Indiana, November, 1885.)

In this case there was a complaint by John Levering against Mrs. Madeline Rochester, and a cross-complaint by her against Levering seeking to compel him to account for the profits made by him upon the sale of lands which he claimed to have purchased from her, but which sale she repudiated. Judgment below against her, and she appealed.

S. P. Baird, J. E. McDonald, J. M. Butler, and *A. L. Mason,* for appellant.

J. R. Coffroth, T. A. Stuart, F. H. Levering, and *F. B. Everett,* for appellee.

MITCHELL, J. (After stating the facts.) That an agent to sell property, can not, either directly or indirectly, become the purchaser from himself, and that such sale is voidable absolutely at the election of the principal or beneficiary, without regard to its fairness, are propositions inflexibly established.

The facts found do not make this a case of that description. While they disclose a relation of the closest and most confidential character between principal and agent, so far as the general management of the financial and business affairs of the principal were concerned, they also show that the agent had no power to sell, and that he did not, in fact, make the sale. The agency with respect to the particular tract of land is stated in the following language: "That said Madeline was desirous of selling this tract, as well as her other unimproved land, and requested said plaintiff to find a purchaser therefor, which he tried to do; * * * that while acting as the confidential agent of said Madeline, and her agent to sell said fifteen acre tract, plaintiff proposed to buy it himself."

Fairly interpreted, this means that while in the relation of general confidential business agent to the appellant, Mr. Levering

was requested to find a purchaser for the land who would pay a fixed price, and while so acting as agent to sell he proposed to purchase the land from his principal and negotiated with her the purchase which is now the subject of controversy. The case is one arising out of a transaction between a confidential agent and his principal, who purposely and intentionally dealt with each other concerning a subject matter involved in the agency. The result of the negotiations between the two was, that the principal consciously and knowingly transferred to her confidential agent the land in controversy at a stipulated price.

While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will, nevertheless, subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the richest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable, that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property, and that there was no suppression or concealment which might have influenced the conduct of the principal. *McCormick vs. Malin,* 5 Blackf. 509, 522; *Cook vs. Berlin, etc. Co.* 43 Wis. 433; *Porter vs. Woodruff,* 36 N. J. Eq. 174; *Young vs. Hughes,* 32 N. J. Eq. 372; *Farnam vs. Brooks,* 9 Pick. (Mass.) 212; *Moore vs. Mandlebaum,* 8 Mich. 433.

As applicable to cases of the character under consideration, the rule is succinctly stated by a learned author in the following language: "Passing to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome; although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid and that no undue advantage is taken, is not of itself sufficient. Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of

the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject matter of the transaction and of the person with whom he was dealing, and gave full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid." 2 Pomeroy, Equity Jurisprudence, sec. 959. Subject to the burdens thus imposed, as was stated in *Fisher's Appeal*, 34 Penn. St. 29, "It never has been supposed that a principal might not sell to his agent, or the client to his attorney; and that their titles, thus acquired, would not be good in the absence of fraud on their part." * * *

Affirmed.

(86 MISSOURI, 27, 56 AM. REP. 408.)

LEACH vs. HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

(Supreme Court of Missouri, April, 1885.)

Action to recover notary's fees. The opinion states the case. The plaintiff had judgment below.

G. W. Easley, for appellant.

H. B. Leach, in person.

RAY, J. The respondent was for a number of years prior to 1878 in the appellant's employ as agent to settle claims for stock killed or injured on the railroad, and as assistant for Mr. Carr, who was the general attorney of appellant, and for his services in these behalfs, received a regular salary. During the time of said employment respondent was appointed and qualified as a notary public, and as such took the acknowledgement of numerous deeds, by defendant, through its land commissioner, and also certified to affidavits of appeals, and also to answers in garnishment made by the appellant, when directed to do so by Mr. Carr. Plaintiff was discharged from said employment by defendant in 1878, and thereafter brought this suit to recover of defendant for said services so ren-

dered as said notary, during his said employment. The plaintiff's claims therefor were appropriately declared on and set out in his petition. There is no conflict, as we gather from the record, as to the actual rendition of said services, or that the rates charged were not such as are authorized by law therefor.

Defendant's answer, so far as we need consider the same, set up said employment of respondent by appellant in the capacities aforesaid, and that the rendition of said notarial service sued for was in due course of said employment, and included in his said compensation, which was duly paid and received. Defendant's answer further set up, by way of counter-claim, that during his employment as its agent, and as an assistant attorney at law, one R. M. Johnson began an action against the appellant, before a justice of the peace, to recover $400 for damages for killing a horse by defendant's cars, and alleged it was respondent's duty to settle said claim and suit, if a legal demand, and if not, to use proper care, ability and diligence in the defence thereof; that respondent attended the trial thereof before the justice of the peace, and was there offered, and refused a settlement thereof for the sum of $160. Upon a trial thereof judgment was rendered for plaintiff therein, and said cause was appealed to the circuit court of Marion county, where on account of this plaintiff's negligence, judgment was rendered by default against this appellant for the sum of $400, whereby appellant claims to have been damaged in said sum, and asks judgment therefor.

The reply of plaintiff, so far as we deem the same material, denied that by the terms of his agreement he agreed to serve defendant as an attorney at law, but claims and avers he agreed to give such assistance as he could in his capacity as stock agent, on the trial of causes for injury to stock, and that he was not in defendant's employ in any other capacity. It admits respondent's refusal to settle the Johnson claim, and his defense thereof as stock agent before the justice, but denies that it was his duty to manage said cause, or attend the same in the circuit court. The trial resulted in a verdict for plaintiff on his said account in the sum of $653.50, and for defendant for one cent on his counter-claim. Judgment was entered in plaintiff's favor for said sum, and defendant appealed therefrom to this court.

The defendant upon the trial offered in evidence the monthly pay-rolls of the company for each month of the years 1873, 1874,

1875, 1876, and 1877, precisely like the one herein set out for the month of February, 1877, except that the amount of the monthly salary raised from $120 to $150 per month, for the purpose of showing payment of all services during the time covered by them, and to show that the plaintiff was acting, during that time as assistant attorney. The court admitted the pay-rolls from April to October, 1877, inclusive, for the purpose only of showing the capacity in which the plaintiff was employed, and refused to admit those from April to October, 1877, for any other purpose, and refused to admit those for the balance of the year 1877, or for any of the other years, for any purpose whatever. In the monthly pay-roll for February, 1877, admit those for plaintiff's name stands opposite the number thirty-five, and he is designated as stock agent and assistant attorney at $135, for the month, and his name written on the thirty-fifth line of said pay-roll, and under the following receipt:

"I acknowledge to have received from the Hannibal & St. Joseph railroad company the amount opposite my name in the following list, in full for all demands for work done during regular and irregular working hours, in the service of said Hannibal & St. Joseph railroad company up to and including the date of this pay-roll."

This evidence was excluded by the court, as was also the following question directed to the plaintiff: "*Q.* Was the business of taking affidavits and acknowledgments performed during the regular business hours during the time you were employed by the defendant?" This action of the court was, we think, erroneous. Whether these notarial services were distinct from and independent of, and not embraced in the plaintiff's contract of service, was, we think, a question of fact to be determined under proper instructions, from a consideration of all competent evidence that might be offered thereon by the parties. The pay-rolls or receipts thus offered were *prima facie* evidence of payment as therein expressed for all services rendered the defendant during regular and irregular hours, and they were competent and receivable for that purpose, as well as to show in what capacity Leach acted, and the relation he bore to the company. *Prima facie* respondent sold and hired to defendant his entire time for this salary, fixed and agreed upon between them, and the rendition of service by respondent as notary in and about the defendant's business during the said time, did not make defendant liable for the statutory fees therefor,

without some agreement or understanding or line of conduct between the parties, showing they were not to be included. Plaintiff's earnings during the time of such employment would belong to the employer. *Stansbury vs. United States*, 1 Ct. of Cl. 123; Wood Mast. and Serv. 198; 2 Whart. Ev. § 1365, and note.

As bearing further upon this question, the inquiry made of plaintiff as to whether the affidavits and acknowledgements were taken during the regular business hours might, we think, have been properly allowed. As the case must go back for re-trial, we may add that we see no prejudice to the defendant in the court's ruling upon the counter-claim in the then state of evidence. Although the Johnson claim may have constituted a legal liability against defendant, plaintiff's duty to settle the same was not an absolute one. He was not bound to give a sound opinion on that question, and in rejecting the offer plaintiff probably relied upon the statement of defendant's witness, who upon the trial may have been contradicted and disbelieved. We can see nothing upon which to base an action of negligence for a failure to settle said claim. As there was no evidence showing defendant's pecuniary damage or loss by the defendant in the Circuit Court, the instruction for nominal damages was, we think, correct.

For these reasons the judgment of the Court of Common Pleas is reversed, and the cause remanded for further proceedings in conformity hereto.

All concur. Judgment reversed and cause remanded.

NOTE.—The rule that the master is entitled to the servant's earnings, does not apply to mere gratuities to the servant. *Ætna Ins. Co. vs. Church* 21 Ohio St. 492. See, also, *Geiger vs. Harris*, 19 Mich. 209. In an action for services, it is no defense that the services were rendered while the claimant was an employé of a third person in another line of business, and that they were rendered both during and out of the business hours of such third person. *Wallace vs. De Young*, 98 Ill. 638, 38 Am. Rep. 108.

II.

TO OBEY INSTRUCTIONS.[1]

(104 MASSACHUSETTS, 152, 6 AM. REP. 207.)

WHITNEY vs. MERCHANTS' UNION EXPRESS COMPANY.

(Supreme Judicial Court of Massachusetts, March, 1870.)

Action to recover for the loss of a draft entrusted to defendant for collection. The draft was drawn upon Plummer & Co., and plaintiffs' instructions to defendant were to return the draft at once if not paid. Instead of doing so, defendant waited to give Plummer & Co. time to correspond with plaintiff about it. Other facts appear in the opinion.

G. O. Shattuck, for plaintiff.

J. G. Abbott and *O. Stevens*, for defendant.

COLT, J. Under the instructions given to the defendants, at the time they received this draft for collection, it was their duty to collect it, or to return it at once to the plaintiff if not paid. It was duly presented by the defendant's messenger for payment on the 14th of October, and payment refused. Instead of returning the draft at once, they retained possession of it in order to enable the drawees to obtain, by correspondence, some explanation from the plaintiffs as to the amount for which it was drawn. Satisfactory explanations were received in due course of mail, and Plummer & Co., the drawees, were ready on the morning of the 16th of the same month to pay the full amount. But the draft was not again presented, and on the 19th they failed, and have since been unable to pay.

It is the first duty of an agent, whose authority is *limited*, to adhere faithfully to his instructions, in all cases to which they can be properly applied. If he exceeds or violates or neglects them, he is responsible for all losses which are the natural consequence of his act. And we are of opinion that there is evidence of neglect in this case, upon which the jury would have been warranted in finding a verdict for the plaintiffs.

The defendants would clearly have avoided all liability by return-

[1] See, also, *Hazard vs. Spears, ante, p.* 182.

ing the draft at once, upon the refusal to pay. It is urged, that the defendants had done all they were bound to do, when they had presented the draft and caused the plaintiff to be notified of its non-payment; that the notice which was immediately communicated by the letter of Plummer & Company, asking explanation, was equivalent to a return of the draft; that this notice was given by the procurement or assent of the defendants, as early as they would be required to give it, if they had themselves done it instead of intrusting it to Plummer & Company; and that, after receipt of it, it was the duty of the plaintiffs to give new instructions, if they desired the draft presented for payment a second time.

There would be force in these considerations, if the letter of Plummer & Company was only a simple notice of non-payment, with no suggestion of further action in regard to it. It expresses and implies much more. The reason for the refusal to pay is stated, and the plaintiffs are told that the defendants will hold the draft until they, Plummer & Company, hear from them. Plainly, if the defendants avail themselves of the letter as a performance of their obligation to give notice, they must abide by the whole of its contents. They make Plummer & Company their agents in writing it, and authorize the plaintiffs to rely on the assurance which it substantially contains, that upon the receipt by Plummer & Company of their explanation the draft would be paid or returned, or notice of its non-payment given.

There is no suggestion in it that the defendants were awaiting further instructions from the plaintiffs, or needed or expected them. It clearly implies that the defendants had only suspended, at the suggestion of Plummer & Company, and for their accommodation, the further performance of the duty they had undertaken, until an answer and explanation could be returned to Plummer & Company. The plaintiffs had no new instructions to give, nor had the defendants any right to expect them. They trusted to others, instead of corresponding themselves with the plaintiffs, who, in this matter, are in no respect chargeable with neglect. The loss is wholly due to the neglect of the defendants, and must be borne by them. According to the agreement of the parties, the entry must be judgment for the plaintiffs.

(68 NEW YORK, 522, 23 AM REP. 184.)

LAVERTY vs. SNETHEN.

(New York Court of Appeals, February, 1877.)

Action to recover damages for the alleged conversion by defendant of a promissory note belonging to plaintiff. The note was made by one Holly, payable to plaintiff's order, who indorsed it and delivered it to defendant to procure a discount thereon for plaintiff.

The jury returned a verdict for the plaintiff and the judgment entered thereon was affirmed by the general term of the Court of Common Pleas of New York. Defendant appealed.

Jas. C. Carter, for appellant.

Samuel Hand and *Patterson & Major,* for respondent.

CHURCH, C. J. The defendant received a promissory note from the plaintiff, made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day, or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available.

Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient.

The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an

agent to the principal is an action of assumpsit or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. Bouv. Law Dict., title Conversion.

SAVAGE, Ch. J., in *Spencer vs. Blackman*, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortuous act by which the defendant deprives the plaintiff of his goods."

In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury), not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion and the authorities I think sustain this conclusion, by a decided weight of adjudication.

A leading case is *Syeds vs. Hay*, 4 T. R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. BUTLER, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly

cited by the courts of this State as good law, and has never to my knowledge been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In *Spencer vs. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution note against the owner, and it was held to be a conversion. SAVAGE, C. J., said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person."

So, when one hires a horse to go an agreed distance and goes beyond that distance, he is liable in trover for a conversion. *Wheelock vs. Wheelwright*, 5 Mass. 104. So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that in legal effect it was a conversion. *Scott vs. Rogers*, 31 N. Y. 676. See, also, Addison on Torts, 310 and cases there cited.

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne vs. Hutchinson*, 3 Taunt. 117, and *Sarjeant vs. Blunt*, 16 Johns. 74, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority.

In the last case, SPENCER, J., distinguished it from *Syeds vs. Hay, supra*. He said: "In the case of *Syeds vs. Hay*, 4 T. R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action, but he had no right to deliver the note to Foote to

take away, any more than he had to pay his own debt with it. Morally there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer vs. Jarmain*, 2 M. & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did and appropriated the avails. PARKE, B., said: "The defendant did nothing with the bill which he was not authorized to do." So, in *Cairnes vs. Bleecher*, 12 Johns. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment.

In *McMorris vs. Simpson*, 21 Wend. 610, BRONSON, J., lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a *tort feasor*." The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. 31 N. Y. 490. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt.

This evidence was not objected to not only, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. Under these circumstances it must be deemed to have been waived, and is not

available upon appeal. But if an exception had been taken I am inclined to the opinion that the testimony was competent. It is not claimed that it varies that part of the receipt which contains an agreement to return the note or the money the next day, but that it varies the clause stating that the note was received for negotiation. This expresses the purpose of receiving the note, and if deemed a contract, can it be said that a parol mandate not to part with possession of the note before sale and receipt of money is inconsistent with it?

There is no rule of law which gives an agent the right thus to part with a promissory note under the mere authority to negotiate. The instructions were consistent with the purpose expressed, although if they had not been given, a wider field of inquiry might have been opened. A promissory note passes from hand to hand, and a *bona fide* holder is protected in his title, and it might well be claimed that an authority to sell would not ordinarily justify a delivery to a third person without a sale. Without definitely passing upon this question, we think that the question should have been in some form presented at the trial. In a moral sense the defendant may have acted in good faith, and hence the judgment may operate harshly upon him, but the fact found by the jury renders him liable in this action.

The judgment must be affirmed.

All concur. Judgment affirmed.

(4 LOUISIANA, 26, 23 AM. DEC. 470.)

PASSANO vs. ACOSTA.

(Supreme Court of Louisiana, May, 1832.)

Action for damages for disobedience of instructions as to collection of a note. The facts appear in the opinion.

Cannon, for the appellant.

Seghers, for the appellee.

By Court, PORTER, J. The petition states that the plaintiff placed in the hands of the defendant a note for collection, executed by one Francis Gaggino, and that the defendant, though often requested, has refused to return the note, or pay its amount.

The answer admits the agency, but affirms that the defendant has handed over to the plaintiff a note of the said Gaggino, payable to the defendant, not yet due, and which note the defendant had received in payment of that mentioned in the petition, in pursuance of the power vested in him by the plaintiff. There was judgment in the court of the first instance for the plaintiff, and the defendant appealed.

The cause turns principally on the question whether the plaintiff conferred power on the defendant to novate the note, or, if he did not, whether he had ratified the act of his agent. The written power produced does not confer the authority which the defendant contends he had, and the parol evidence fails to establish it. The plaintiff has not relied alone on the want of power which results from the failure of the defendant to show it; he has proved his directions were not complied with, the authority to novate being accompanied with the condition of the maker giving security. The note here was taken in favor of the defendant, and has not been endorsed by him.

There is not sufficient evidence to authorize us to say the plaintiff ratified the act of his agent. The latter was charged with the care and management of a store in which the former was a partner, and this note was found among the books which the defendant left when his agency terminated. It is proved the plaintiff complained of the act of the defendant and that he told him he could not lose the whole amount of the note.

The defense which is presented by the defendant, of the mandate being gratuitous, and of his act being, under all the circumstances, a sound exercise of discretion, cannot avail him; for, under the evidence, discretion was not conferred on him to the extent now claimed. He was directed not to renew the note unless the maker gave security.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

(26 SOUTH CAROLINA, 611.)

NIXON vs. BOGIN.

(Supreme Court of South Carolina, April, 1887)

Plaintiff drew drafts, with bills of lading attached, on one Pool, and sent them for collection to defendant, who was neither an attorney at law nor a collecting agent. The drafts called for the amounts stated "with exchange on New York and collection charges." Defendant surrendered the drafts to Pool on receiving from him drafts on New York and Charleston for the amounts thereof, New York exchange in full not being obtainable. Defendant forwarded these drafts to plaintiff and made no charge. One of the Charleston drafts was not paid, and this action was to recover the amount thereof from the defendant. The verdict was for defendant, and plaintiff appealed.

Moises & Lee, for appellant.
Blanding & Blanding, contra.

MCGOWAN, J. *Held* (The opinion in full not being reported in the official reports) 1. If one not in business as a collecting agent, or holding himself out as such, is requested by a friend to collect a particular debt for him, and he, being willing to oblige, undertakes to do so without compensation, he is certainly not liable for loss without proof of his negligence.

2. If exchange on New York, as required by the draft, could not be had, defendant did not render himself personally liable if he did the best he could for the drawers.

3. Under the circumstances, plaintiffs could not exact from defendant more than an honest effort to save them according to his capacity. Affirmed.

NOTE—See also *Williams vs. Higgins,* 30 Md. 404.

III.

NOT TO BE NEGLIGENT.[1]

(37 MICHIGAN, 415.)

PAGE vs. WELLS.

(Supreme Court of Michigan, October, 1877.)

The defendant, Page, was engaged in the business of looking up desirable parcels of public lands, on which timber was standing, and of furnishing information of such parcels to persons desiring to locate such lands, upon their paying him for the information. On one occasion when he was going into the woods for this purpose, the plaintiff, Wells, said to him that if he would look him up some good pine lands, he would pay him for it. Page agreed to do this, and afterwards furnished to Wells the descriptions of certain parcels which he said were good pine lands, and Wells bought the lands relying upon this representation. The lands proved not to be as good as represented, and Wells brought this action against Page to recover damages, based upon the theory that Page had impliedly warranted his descriptions to be correct. He recovered in the court below, and Page brings error.

Mitchel & Pratt, for plaintiff in error.

A. B. Morse, for defendant in error.

COOLEY, C. J. (After stating the facts.) The plaintiff regards the transaction as in the nature of a sale of a chattel, and insists that it is to be governed by the rules regarding the sale of personalty. The argument in substance is that defendant had a property in his superior information respecting the lands and his skill in judging of their value; that he embodied these in the descriptions which he sold, and that he might and did warrant the truth of these—in which their value consisted—as he might warrant the soundness of a horse or the validity of a title. This we think is a fair statement of the plaintiff's position, though it is stated in our own language and with brevity.

Had it appeared that the defendant was possessed of this information, and had made up his descriptions previous to the bargain between these parties, and that under such circumstances he

[1] See also *Leach vs. Hannibal & St. Joseph R. R. Co.*, *ante*, p. 480.

assumed to sell his special information, the case would be so far different from the present that possibly different principles might apply. It might then be argued with some force that the case resembled the sale of a valuable secret, and that the rules governing the sales of personalty were applicable. But this was no such case. Here the arrangement was for the future acqusition by the defendant of information for the plaintiff's benefit, and for the report of this to the plaintiff. It is impossible, as we think, to treat it as anything but an employment. It was no more a sale of descriptions than is it a sale of opinions when a lawyer is employed to examine a case and report his views, or a physician to diagnose a case of disease. In one sense there is a sale in all such cases, but the law treats it as an employment and the rendering of services in pursuance thereof.

Nor in any such case can there be any implied warranty of the absolute truth of the description given. Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith or dishonesty he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them. A positive affirmation of the quality of lands as of one's personal knowledge when he has no knowledge on the subject, whereby his employer is misled and injured, should certainly render the person making it liable, either on the ground of bad faith or of negligence; but it could not be treated as a warranty of the quality of the information sold.

(Omitting a consideration of the measure of damages.)

Judgment reversed.

(11 LOUISIANA ANNUAL, 27, 66 AM. DEC. 193.)

JOHNSON vs. MARTIN.

(Supreme Court of Louisiana, February, 1856.)

Action to hold defendant responsible for money sent by mail addressed to him, by plaintiff who was defendant's principal. The money was stolen by a former employé of defendant whom he had discharged for dishonesty. Plaintiff contended that defendant was negligent in not anticipating this, and in not directing the postmaster not to deliver letters to such former employé. Judgment below for defendant.

Bonford, for appellant.

H. & J. A. Gaither, for defendant.

LEA, J. (After holding that the money had not yet been delivered to defendant.) The next question to be determined is whether the defendant has been guilty of neglect. An agent may properly be held responsible for a neglect to provide against the risks or perils to which property intrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events. The plaintiff undertook to send a certain sum of money to the defendant; until it is received, the latter cannot be held accountable for it. At the time the robbery took place it was no more under the defendant's control than that of the plaintiff; and though we are not prepared to say that, under the peculiar circumstances of this case, as disclosed by the evidence, the plaintiff himself was guilty of neglect, yet nothing in the record justifies the assumption that the defendant was bound to protect the plaintiff against acts of fraud or violence which might be perpetrated upon the postoffice by one who was not in his employ or under his control. We think the the plaintiff is not entitled to claim from the defendant a reimbursement of the money of which he has been robbed by a third person, the act by which the loss was occasioned not being one which, under the circumstances, the defendant could reasonably have anticipated.

Affirmed.

IV.

TO ACCOUNT FOR MONEY AND PROPERTY.

(25 ARKANSAS, 462.)

JETT vs. HEMPSTEAD.

(Supreme Court of Arkansas, June, 1869.)

Action to recover money collected by an attorney or agent. Judgment for plaintiff below.

Gallagher & Newton, for appellant.
Fay Hempstead and *Garland & Nash,* for appellee.

WILSHIRE, J. (After stating the facts.) This court have heretofore held that an action cannot be sustained against an attorney at law, and the same rule would apply to an agent for money collected by him for his clients, until after a special demand has been made by the client, or some one duly authorized by him him to make the demand, and a refusal to pay over or remit, after instructions. *Cummins vs. McLain,* 2 Ark. 412; *Sevier vs. Holliday,* Id. 512; *Palmer vs. Ashley,* 3 Ark. 75; *Taylor vs. Spears,* 6 Ark. 381, 44 Am. Dec. 519, and 8 Ark. 434; *Warner vs. Bridges,* 6 Ark. 385. This doctrine seems to be universally held by all the courts of this country. But it must be borne in mind that it is in cases where the attorney has faithfully performed his duty, by giving his client timely notice of his action, etc.

It is the duty of an attorney or agent, who has collected money for or on account of his client or principal, to give notice within a reasonable time of the fact. Story on Agency, sec. 208. When the principal has received such notice, he is bound to make demand of it within a reasonable time, and if he omits to do so, he puts the statute in motion, and when he suffers the time which it limits to expire, without bringing suit, is concluded by his laches.

But where an attorney or agent has collected money, and neglects to advise his client or principal of the fact, although his client or principal might maintain suit against him without demand, on the principle of his bad faith, the statute of limitations will not commence to run until the client or principal has notice by some means that his attorney or agent has collected the money, unless the attorney or agent shows affirmatively,

by satisfactory evidence, that his client or principal could, by the exercise of ordinary diligence, have known that the money had been collected, and was in the hands of the attorney or agent. And this, we think, is so, because the attorney or agent, by concealing the fact of collection, commits a fraud upon his client or principal, and in this view of the case we are supported by the case of *Riddle vs. Murphy*, 7 S. & R. (Pa.) 235.

In the case of *McDonald vs. Potter*, 8 Barr, (Pa.) 189, the court said: "The principle ruled in the case of the *Harrisburg Bank vs. Forster*, 8 Watts. 16, applies here. As in that case, an attorney stands in a fiduciary character, and, before he can be permitted to avail himself of the defense, he must prove that he performed his duty, and his omission to do so amounts to such concealment of the state of the business as in contemplation of law is such a fraud as to deprive him of the protection of the statute, and makes it necessary to prove payment of the debt as in other cases." The same principle is held in *Jennings vs. McConnel*, 17 Ill., 150. * * *

Reversed.

(46 WISCONSIN, 481, 32 AM. REP. 731.)

KIEWERT vs. RINDSKOPF.

(Supreme Court of Wisconsin, January, 1879.)

Plaintiff's brother was under indictment. Defendant informed plaintiff that for $3,000, one Wight, an attorney, would bring such influence to bear upon the government officers as to secure a mitigation of the penalty. Plaintiff gave the amount to defendant to be paid to Wight for the purpose stated. Defendant paid Wight only $1,000 and kept the balance himself. This action was to recover the $2,000 judgment below for defendant.

Jenkins, Elliott & Winkler, and *D. S. Wegg* for appellant.

Cottrell, Cary & Hanson, for respondent.

ORTON, J. (After disposing of two other points).

III. If it is found from the evidence that the agreement was, that Wight should render such services so claimed to be improper and against public policy, for the sum of three thousand dollars,

and the defendant obtained the same from the plaintiff for the purpose of such payment, but actually paid Wight only one thousand dollars, and converted the other two thousand dollars to his own use, even then the plaintiff may recover the money so misapplied and converted, and the defendant cannot defend on the ground that the contract for such services was illegal or against public policy. In respect to such a transaction, the defendant was the agent of the plaintiff, and received the money of the plaintiff with specific directions as to its application and payment as such, and cannot be allowed to say, in defense of an action to recover the moneys so misapplied and converted, in respect to the contract in pursuance of which, or on account of which, he received it, *contra bonos mores*, to exculpate himself from his admitted fraud and breach of trust.

The maxim, *In pari delicto melior est conditio possidentis*, has application only as between the immediate parties to an illegal contract, and does not govern where the action is brought by one of such parties to recover money received by a third party in respect of his illegal contract. Broom's Legal Maxims, §§ 567–8; *Tenant vs. Elliott*, 1 B. & P. 3; *Farmer vs. Russell*, Id. 296; *Bousfield vs. Wilson*, 16 M. & W. 185. Within this principle it has been held that when moneys of the principal are in the hands of an agent, as the proceeds of property sold, with directions of the principal to pay it out for an illegal purpose, and the agent pays out for such purpose only part of such moneys, and converts the balance to his own use, the principal may recover of the agent such unexpended balance (*Bone vs. Eckless*, 19 L. J. Exch. 438); and that money bet upon an election, and deposited with a stakeholder, who, after the event of the election is known, has notice not to pay it over to the winner, may be recovered back by the loser. *Hastelow vs. Jackson*, 8 B. & C. 221; *McAllister vs. Hoffman*, 16 S. & R. 147, 16 Am. Dec. 556. "While the law will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to his master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction." Wood on Master and Servant, § 302; *Anderson vs. Moncrieff*, 3 Desauss. 126; *Brooks vs. Martin*, 2 Wall. 79; *Gilliam, Ex'r vs. Brown*, 43 Miss. 641.

While the money remains in the hands of the agent, notwith-

standing such agent may have received it for the purpose of using it or paying it out in pursuance of an illegal contract between his principal and a third person, and has been directed to so use or pay it, there appears to be no reason for making an exception to the law governing the relation between principal and agent, for such a case, which would prevent the principal from countermanding such directions, and revoking the authority of the agent, and recovering the money. The principle recognized by the above authorities has been sanctioned by the court in *Douville vs. Merrick*, 25 Wis. 688, and need not be further considered, except to affirm it in this case.

IV. As to the two thousand dollars never paid out in pursuance of an agreement with Wright, however illegal that agreement may have been, and to the extent of such non-payment, the contract remains *in fieri* and executory, and to that extent may be rescinded, and the money so remaining in the hands of the defendant may be recovered. The law will not lend its aid to enforce an illegal contract while it remains executory, or disturb it after it is fully executed (2 Chitty on Cont. 971; *Miller vs. Larson*, 19 Wis. 463); but it will in all cases favor its rescission and abandonment before its execution. 2 Pars. on Cont., § 476. "If an illegal contract be executory, and if the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance, recover back money while *in transitu* to the other contracting party, there being in the case a *locus poenitentiae*, and the *delictum* being incomplete." *Edgar vs. Fowler*, 3 East, 225; *Vischer vs. Yates*, 11 Johns. 30; 2 Chitty on Cont. 918. * * *

Reversed.

V.

TO GIVE NOTICE TO PRINCIPAL.

(4 WATTS & SERGEANT, 305.)

DEVALL vs. BURBRIDGE.

(Supreme Court of Pennsylvania, September, 1842.)

Action on the case for negligence. Defendant as agent was operating a steamboat owned by plaintiff and others, and during

the time she was seized by creditors and sold at a gross sacrifice. Defendant did not apprise plaintiff of this seizure. Judgment below for defendant, under direction of the court.

Deford, for plaintiff in error.
Waugh, contra.

GIBSON, C. J. (After stating the facts.) It is an agent's imperative duty to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security (Paley, 38; Beawes, 39); and had notice been given in this instance, it is not to be credited that the owners, or the plaintiff singly, would have suffered a boat which cost $8,000 to be sacrificed for less than the twentieth part of the sum.

The case is too glaring to admit of doubt. But even if there had been a doubt, it ought to have been submitted to the jury, with a direction to find for the defendant only on being convinced that notice would have been unavailing. It was not his business to judge for others, and by omitting to apprise the plaintiff of the crisis, he took on himself all but the unavoidable losses which were incident to it. Nor is his neglect of his agency to be excused because it had become troublesome. He had voluntarily accepted it, if he had not solicited it, and if, to use his own phrase, he did not want to be bothered with it, his course was to settle his accounts and resign it—not to abandon it. Such is the rule of the common law, and, for breaking it, the defendant is chargeable with a dereliction of duty. * * * Reversed.

NOTE—Agent must give principal timely notice of all facts coming to his knowledge which it is essential that the principal should know in order to protect or preserve his interests: *Arrott vs. Brown*, 6 Whart. (Pa.) 9; *Harvey vs. Turner*, 4 Rawle, (Pa.) 223; *Callander vs. Oelrichs*, 5 Bing. N. C. 58.

CHAPTER III.

DUTIES AND LIABILITIES OF AGENT TO THIRD PERSONS.

I.

IN CONTRACT.

(101 PENNSYLVANIA STATE, 311, 47 AM. REP. 718.)

KROEGER vs. PITCAIRN.

(Supreme Court of Pennsylvania. November, 1882.)

Pitcairn was a fire insurance agent and had written a policy for Kroeger. Kroeger kept petroleum on his premises which was forbidden by the terms of the policy, unless written consent was indorsed thereon. Kroeger called Pitcairn's attention to this clause and was assured by the latter that no written indorsement was required where the amount kept was so small as that which Kroeger carried in stock. Kroeger therefore accepted the policy without the indorsement. A fire destroyed his stock and in an action against the insurance company, Kroeger was defeated because he had kept this petroleleum without the written consent. He brought this action against Pitcairn to recover damages for the misrepresentation. Judgment for defendant below.

Dalzell and *Hampton,* for plaintiff in error.

Schoyer and *McGill,* for defendant in error.

STERRETT, J. The subject of complaint, in both specifications of error, is the entry of judgment for defendant *non obstante veredicto.* It is contended that upon the facts established by the verdict, judgment should have been entered thereon in favor of plaintiff. The jury were instructed to return a verdict for the amount claimed by him, if they were satisfied the allegations of fact contained in the point presented by him were true. In view of this, the finding in his favor necessarily implies a verification of the several matters specified in plaintiff's point, and hence it must

now be regarded as containing a truthful recital of the circumstances connected with the delivery of the policy and payment of the premium.

The transaction, as therein detailed, clearly amounted to a mutual understanding or agreement between the parties that the stock of merchandise mentioned in the policy should include one barrel of carbon oil; in other words, that the plaintiff should have the privilege of keeping that quantity of oil in connection with and as a part of the stock insured, without thereby invalidating his policy. It is impossible to regard the transaction in any other light. The jury found that plaintiff "took the policy upon the faith" of the representations made by defendant. These representations were not merely expressions of opinion as to the meaning of the policy. On the contrary, the defendant acting as its agent and assuming authority to speak for the insurance company, asserted without any qualification that when carbon oil was kept as plaintiff was in the habit of keeping it—a single barrel at a time—it was unnecessary to mention the fact in the policy, or otherwise obtain the consent of the company; that no notice is ever taken of it unless "it is kept in large quantity—say several hundred barrels. In that case, when it is wholesale, it should be mentioned; but as long as it is kept, not more than a barrel in the store at a time, it is considered as general merchandise and is not taken notice of in any other way." Such was the language employed by defendant, evidently for the purpose of dispelling any doubt that existed in the mind of the plaintiff and inducing him to accept the policy and pay the premium; and to that end at least it was successful. What was said and done by defendant, in the course of a transaction, amounted to more than a positive assurance that the accepted meaning of the policy was as represented by him. In effect, if not in substance, his declarations were tantamount to a proposition, on behalf of the company he assumed to represent, that if the insurance was effected it should be with the understanding that a barrel of carbon oil was included in and formed part of the insured stock of merchandise, without being specially mentioned in the policy.

The plaintiff doubtless so regarded his declarations, and relying thereon, as the jury has found, accepted the policy on the terms proposed, and thus concluded, as he believed, a valid contract of insurance, authorizing him to keep in stock, as he had theretofore done, a small quantity of carbon oil. It was not until after the

property was destroyed that he was undeceived. He then discovered, that in consequence of defendant having exceeded his authority, he was without remedy against the company. Has he any remedy against the defendant, by whose unauthorized act he was placed in this false position? We think he has. If the president or any one duly authorized to represent the company had acted as defendant did, there could be no doubt as to its liability. Why should not the defendant be personally responsible, in like manner, for the consequences, if he, assuming to act for the company, overstepped the boundary of his authority and thereby misled the plaintiff to his injury, whether intentionally or not.

The only difference is that in the latter the authority is self-assumed, while in the former it is actual, but that cannot be urged as a sufficient reason why plaintiff, who is blameless in both cases, should bear the loss in one and not in the other. As a general rule, "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for, or on account of his principal." Story on Agency, 264. The same principle is recognized in Evans on Agency, 301; Whart. on Agency, 524; 2 Smith's Lead. Cases, 380, note; 1 Pars. Cont. 67, and in numerous adjudicated cases, among which are *Hampton vs. Speckenagel*, 9 S. & R. 212, 222; 11 Am. Dec. 704; *Layng vs. Stewart*, 1 W. & S. 222, 226; *McConn vs. Lady*, 10 W. N. C. 493; *Jefts vs. York*, 10 Cush. 392; *Baltzen vs. Nicolay*, 53 N. Y. 467.

In the latter case, it is said, the reason why an agent is liable in damages to the person with whom he contracts when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form that of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In *Layng vs. Stewart, supra*, Mr. Justice HUSTON says: "It is not worth while to be learned on very plain matters. The cases cited show that if an agent goes beyond his authority and employs a person, his principal is not bound, and in such case the agent is bound."

The plaintiff in error, in *McCon vs. Lady, supra*, made a contract, believing he had authority to do so, and not intending to bind himself personally. The jury found he had no authority to make

the contract as agent, and this court, in affirming the judgment, said: "It was a question of fact submitted to the jury whether the plaintiff in error had authority from the school board to make the contract as their agent. They found he had not. He was personally liable whether he made the contract in his own name or in the name of his alleged principal. It is a mistake to suppose that the only remedy was an action against him for the wrong. The party can elect to treat the agent as a principal in the contract."

The cases in which agents have been adjudged liable personally have sometimes been classified as follows, viz.: 1, Where the agent makes a false representation of his authority with intent to deceive. 2, Where, with the knowledge of his want of authority, but without intending any fraud, he assumes to act as though he were fully authorized; and 3, Where he undertakes to act *bona fide*, believing he has authority, but in fact has none, as in the case of an agent acting under a forged power of attorney. As to cases fairly brought within either of the first two classes there cannot be any doubt as to the personal liability of the self-constituted agent, and his liability may be enforced either by an action on the case for deceit, or by electing to treat him as principal. While the liability of agents, in cases belonging to the third class, has sometimes been doubted, the weight of authority appears to be that they are also liable.

In Story on Agency, the learned author, recognizing the undoubted liability of those belonging to the first two classes, says: "Another case may be put which may seem to admit of some doubt, and that is where the party undertakes to act as an agent for the principal, *bona fide*, believing he has due authority, and therefore acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible, as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice, for every person so acting for another, by a natural if not a necessary implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority and acts *bona fide*, still he does a wrong to the other party; and if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury

should be borne by the other party who has been misled by it." Story on Agency, 264. This principle is sustained by the authorities there cited, among which is *Smout vs. Ilbery*, 10 Mees. & Wels. 1, 9.

Without pursuing the subject further, we are of the opinion that upon the facts established by the verdict, judgment should have been entered for the plaintiff, on the question of law.

Judgment reversed, and judgment is now entered in favor of the plaintiff for $3,027.20, the amount found by the jury, with interest from January 20, 1882, the date of the verdict.

Judgment reversed.

NOTE.—See, also, *Farmers' Co-operative Trust Co. vs. Floyd*, 47 Ohio St. 525, 12 L. R. A. 346, 21 Am. St. Rep. 846, and notes.

(100 NEW YORK, 140.)

SIMMONS vs. MORE.

(New York Court of Appeals, October, 1885.)

Action to recover damages for alleged breach on the part of defendants of an implied warranty of authority to execute a contract of purchase made by them ostensibly as agents for and on behalf of principals named. The opinion states the facts. Plaintiff had judgment below.

Adolph L. Sanger, for appellants.

W. C. Beecher, for respondents.

DANFORTH, J. The trial court refused to non-suit the plaintiffs, and so held that the case stated and proved by them was *prima facie* sufficient to make the defendants liable. That conclusion has been sustained by the General Term and we think properly. The evidence showed that the plaintiffs were coffee dealers in the city of New York, and the defendants brokers in the same place. The latter were in correspondence with other brokers (Turnley & Co.) of the city of Galveston, Texas, and prior to the 6th of March, 1882, received from them orders to buy a certain quantity of coffee for the firm of Marx & Kempner, and a certain other quantity for Moore, Stratton & Co. of Galveston.

This was done, and bought and sold notes describing the con-

tracts as between the plaintiffs and these firms respectively were signed by the defendants in their firm name as brokers. It was apparent, therefore, upon the face of the paper that they were contracting on behalf of others and could not be personally liable as purchasers, (*Fleet vs. Murton*, L. R. 7 Q. B. 126), but from such an instrument a contract is to be implied that they had authority to make it on behalf of the persons named (*Fairlie vs. Fenton*, L. R. 5 Ex. 769), and on this the plaintiffs relied. They caused the coffee to be procured, and at once taken to the dock for shipment, as directed, to the Galveston merchants, but on arrival at that place it was refused by them on the ground that the delivery in point of time was not in conformity with the orders. It then appeared that the orders actually given by them to Turnley & Co. required in each instance a shipment on the 6th of March. This, however, was not communicated to the plaintiffs, nor made a part of the contract, nor was it in fact known to the defendants. They obeyed the order as it was received from their correspondents, but they executed it in the name of the principals and so assumed the risk of its correctness.

First. The plaintiffs have no cause of action against the principals, for the order they executed was not their order. Hence it was given by the defendants in excess of authority, and there seems no reason why they should not make good all damages which the plaintiffs sustained in consequence of their belief that the authority assumed did in fact exist. (*Baltzen vs. Nicolay*, 53 N. Y. 467).

Second. The contract was admitted by the pleadings, and was, moreover, sufficient in form to satisfy the statute of frauds. The defendants are held liable, because they had no authority to make it, and hence, though sufficient in form, it cannot be enforced against the apparent principal.

Third. The damages recovered were only those directly caused by the assertion of the defendants that they had authority. The amount was warranted by the evidence, and the question was submitted to the jury with proper instructions. Whether their verdict was excessive is not the proper subject for inquiry.

The order denying a new trial was not appealed from, and the only questions properly before us relate to the correctness of the judgment. In that we find no error and think it should be affirmed. All concur.

Judgment affirmed.

(47 NEW JERSEY LAW, 457, 54 AM. REP. 178.)

PATTERSON vs. LIPPINCOTT.

(Supreme Court of New Jersey, November, 1885.)

Action of debt upon the contract stated in the opinion. Judgment below for defendant.

J. J. Crandall, for plaintiff.

Slape & Stephany, for defendant.

SCUDDER, J. An action of debt was brought in the court for the trial of small causes by Jacob M. Patterson against Barclay Lippincott, to recover the balance, $75, claimed under a contract in writing for the sale of the exclusive right to use, manufacture and sell the plaintiff's patent "air-heating attachment" in Atlantic county, New Jersey. The writing was signed "Geo. P. Lippincott, per Barclay Lippincott," on the part of the purchaser. The state of demand avers that by virtue of this agreement the plaintiff did in due form convey said patent right to said George P. Lippincott, that said George and Barclay, on request have refused to pay said balance, and that, since payment became due, the plaintiff has found out and charges that said George is under the age of twenty-one years. He further avers that he never had any contract or negotiations with George, and that Barclay's warranty of authority to act for his minor son is broken, whereby an action has accrued to the plaintiff against the defendant.

The averment that the plaintiff never had any contract or negotiations with George is not sustained by the proof, for the testimony of Joseph N. Risley, the agent who made the sale, which is the only evidence on this point that appears in the case, is that the defendant told him he was going out of business and intended to transfer it to George; requested him to see George; he did so, talked with him; he looked at the patent; was satisfied with it, and talked with his father about buying it. The deed for the patent right in Atlantic county was drawn to George P. Lippincott. It is proved by the admission of the defendant Barclay Lippincott that at the time of such sale and transfer his son George was a minor. This admission is competent testimony in this suit against him.

A verdict of a jury was given for the plaintiff against the defendant in the court for the trial of small causes; and on the

trial of the appeal in the Court of Common Pleas there was a judgment of non-suit against the plaintiff. The reason for the non-suit does not appear on the record, but the counsel have argued the cause before us on the case presented by the pleadings and proofs, the contention being here, as it was below, that the plaintiff could not aver and show the infancy of George P. Lippincott, and bring this action against Barclay Lippincott, as principal in the contract, in contradiction of its express terms.

On the face of the written agreement George P. Lippincott is the principal, and Barclay Lippincott the agent. The suit on the contract should therefore be against the principal named, and not against the agent, unless there be some legal cause shown to change the responsibility. The cause assigned by the plaintiff is the infancy of George at the time the agreement was made in his name by his father. The authority on which he bases his right of action is *Bay vs. Cook*, 2 Zab. (N. J.) 343, which follows and quotes *Mott vs. Hicks*, 1 Cow. (N. Y.) 536, 13 Am. Dec. 550, to the effect that if a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible, and the agent, when sued on such contract, can exonerate himself from the personal responsibility only by showing his authority to bind those for whom he has undertaken to act. *Bay vs. Cook* was an action against an overseer who had employed a physician to attend a sick pauper, without an order for relief under the provisions of the act concerning the poor. As his parol contract with the physician was entirely without authority to bind the township, it was said that he had only bound himself to pay for the services rendered at his request.

Later cases have held that an agent is not directly liable on an instrument he executes, without authority, in another's name; that the remedy in such case is not on the contract, but that he may be sued either for breach of warranty or for deceit, according to the facts of the case. *Jenkins vs. Hutchinson*, 13 Q. B. 744; *Lewis vs. Nicholson*, 18 Q. B. 503; *Baltzen vs. Nicolay*, 53 N. Y. 467; *White vs. Madison*, 26 N. Y. 117, and many other cases collected on the notes in Wharton on Agency, §§ 524, 532, and notes to *Thompson vs. Davenport*, 9 B. & C. 78, in 2 Smith's Lead. Cas. 358 (Am. ed). ANDREWS, J., in *Baltzen vs. Nicolay, supra*, says: "The ground and form of the agent's liability in such a case has been the subject of discussion, and there are conflicting decisions

upon the point; but the later and better-considered opinion seems to be, that his liability, when the contract is made in the name of principal, rests upon an implied warranty of his authority to make it, and that the remedy is by an action for its breach."

Although the state of demand in the present case is uniformly drawn, there is in the last sentence a charge that the defendant's warranty of authority in pretending to act for said minor is broken, whereby an action has accrued. This alleged breach of an implied warranty is founded on the assumption that the son could not confer any authority during his minority to his father to act for him in the purchase of this patent right. There are two answers to this position. The act of an infant in making such a contract as this, which may be for his benefit in transacting business, either directly or through the agency of another, is voidable only, and not absolutely void, and therefore there is no breach of the implied warranty unless there be proof showing that the act of the agent was entirely without the infant's knowledge or consent. The mere fact of the infancy of the principal will not constitute such breach.

It was argued in *Whitney vs. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, that a promissory note signed by Dutch for his partner Green, who was a minor, was void as to Green, because he was not capable of communicating authority to Dutch to contract for him, and that being void, it was not the subject of a subsequent ratification. But the court held that it was voidable only, and having been ratified by the minor after he came of age, it was good against him. See Tyler. Inf. Ch. III, §§ 14, 18.

Another answer is that the defense of infancy to this contract with the plaintiff can only be set up by the infant himself or those who legally represent him. Infancy is a personal privilege of which no one can take advantage but himself. *Voorhees vs. Wait*, 3 Green (N. J.) 343; Tyler Inf. ch. IV, § 19; Bingham, Inf., 49.

In this case the plaintiff seeks to disaffirm the infant's contract with him, in his own behalf, and sue a third party on the contract, whose authority to bind him the infant has not denied. The privilege of affirming or disaffirming the contract belongs to the infant alone, and the plaintiff cannot exercise it for him. The mere refusal to pay, charged in the demand and proved, is not a denial of the defendant's authority to bind the infant, for it may

be based on the failure of consideration, the invalidity of the patent, fraudulent representations, or other causes.

The judgment of nonsuit entered in the court of common pleas will be affirmed.

(64 IOWA, 220, 52 AM. REP. 436.)

LEWIS vs. TILTON.

(Supreme Court of Iowa, June, 1884.)

Action to recover upon a lease. Defendants demurred. Judgment for defendants. Plaintiff appeals.

Williams, Jaques & Adler, for appellant.

Chambers & McElroy, for appellees.

SEEVERS, J. * * * The more serious question is whether the defendants are individually liable under the lease, which on its face shows that it was entered into between the plaintiff, as party of the first part, and the Ottumwa Temperance Reform Club, party of the second part, and is signed by the plaintiff, and by the defendants as follows:

"Executive committee of the Ottumwa Temperance Reform Club.

R. L. TILTON.
S. B. THRALL.
DAVID EATON.
JOSEPH SLOAN."

It is insisted that the lease shows that the credit was extended to the club, and that the contract was made with it; that the principal was named, and therefore the defendants cannot be made individually liable. This line of argument possibly would be conclusive if there was a principal. But there is none. The club is a myth. It has no legal existence, and never had. It cannot sue or be sued.

The defendants contracted in the name of a supposed principal; that is, they claim there was a principal for whom they were acting, but it now appears that there was no principal known to the law. But under the allegations of the amended petition, it should be assumed, we think, that there was as a matter of fact a body of men associated together for a benevolent purpose, who had assumed

the name above stated for the avowed purpose, by their united efforts of suppressing intemperance. There is however some doubt in our minds whether it can be said that the plaintiff extended credit to an organization that had no legal existence. As the law does not recognize such an organization, we are at a loss to know how or why it can be said as a matter of law that the plaintiff contracted with, and extended credit to a mere myth. In legal parlance, the organization can not be named. It has no habitation or place of abode.

It is also insisted that a fund was provided for the payment of debts, and hence it must be presumed that the plaintiff contracted in reliance upon such fund, and therefore the defendants cannot be made individually liable. What the fact may be we are not advised, but certainly this does not appear on the face of the petition and we have looked into the lease, and there is no provision in it from which such an inference can be drawn. It is also insisted that there is no known legal principle or rule under which the defendants can be made liable. It is said that they are not parties. This is true; that is to say, these defendants could not bind any other member of the organization as a partner in a joint enterprise, or a contract as to which he had no knowledge and to which he did not assent. But we think "those who engage in the enterprise (that is, became members of the organization) are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it."

It was also held in *Ash vs. Guie,* 97 Penn. St. 493, 39 Am. Rep. 818 (*ante,* p. 45); *Fredendall vs. Taylor,* 26 Wis. 286, and this rule is supported to some extent by what was said by this court in *Keller vs. Tracy,* 11 Iowa, 530, and *Drake vs. Board of Trustees,* 11 Iowa, 54. But it is said these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of that alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence. We think the demurrer should have been overruled.

Judgment reversed.

(60 BARBOUR, 566.)

HERRICK vs. GALLAGHER.

(Supreme Court of New York, November, 1871.)

Herrick was an expressman and received from another carrier a C. O. D. package for Hintermyer, which purported to be a prize drawn by the latter in a lottery. There was due upon it $26,25. Hintermyer borrowed the money of Gallagher to get the package, which, when opened, proved to contain a few sticks of wood and some old papers. Hintermyre and Gallagher went at once to Herrick's house and persuaded his housekeeper to return to them the identical money paid by them. Herrick sued Gallagher to recover the money. Judgment below for plaintiff.

D. O'Brien, for appellant.

J. B. Emmes, for respondent.

TALCOTT, J. (After stating the facts.) No doctrine in the law of agency is better established than that which is laid down in Story on Agency (§ 300), as follows: "If a party who has paid money to an agent for the use of his principal becomes entitled to recall it, he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided that no change has taken place in the situation of the agent since the payment to him and before such notice." And as is said by the court in *Hearsay vs. Pruyn* (7 John. 179): "An action may be maintained against an agent who has received money to which the principal had no right, if the agent has had notice not to pay it over."

This principle has been repeatedly applied in cases where the money has been paid to the agent by mistake; *a fortiori* is it applicable where it has been procured by the fraud of either the agent or the principal. (See *Cox vs. Prentice,* 3 M. & Sel. 345; *La Farge vs. Kneeland,* 7 Cowen, 456; *Mowatt vs. McLelan,* 1 Wend. 173.

The rule laid down in all the cases is, that in order to protect the agent, he must have paid over the money to his principal, or in some way have changed his situation *since* the payment of the money to himself, upon the faith of such payment. In this case it is not pretended that the plaintiff had paid over the money to the consignors or the express company, either before or after the pay-

ment to him. In answer to a question on that subject, he says that he had, at the time when he took the box, the amount in the hands of the express company.

The case is similar in principle to that of *Buller vs. Harrison*, (Cowp. 565). There, a claim was made by parties in New York, through their agent in London, upon the underwriters, for the alleged loss of a vessel. The underwriters, supposing the loss to be fair, as did the agent, paid over to the agent the amount of the policy. Afterward discovering the loss to be foul, they gave notice to the agent, and sued him to recover back the money. The agent had credited the money in account with his principals, as against a larger sum in which they stood indebted to him, but had given no new credit, and accepted no new bills. It was held, Lord MANSFIELD delivering the opinion of the court, that the plaintiffs were entitled to recover. Here, the money was obtained by a palpable fraud, of which the express company and the plaintiff, though the innocent instruments, were nevertheless *the instruments and agents*, through whom the fraud was perpetrated.

There is no doubt but the plaintiff or the express company, whichever had received the money, would have been liable to the defendant in an action to recover it, on being notified of the fraud, and a demand that the money be refunded; and no doubt the identical money, if it were traced, as it was in this case, could have been replevied.

The defendant, Hintermyer's agent, having regained possession of the money, is under no obligation, legal or moral, to restore it to the plaintiff; neither is the plaintiff liable to the consignors or the express company. The charges for freight follow the principal sum. Hintermyer was under no obligation to pay the freight, and the freight money was an incident of, and obtained by, the same fraud as the larger sum.

The plaintiff and the express company have been imposed upon by the consignors, and must look to them for redress.

The judgment of the county court, and of the justice, should be reversed.

Judgment reversed.

NOTE.—See, also, *Larkin vs. Hapgood*, 56 Vt. 597; *Smith vs. Binder*, 75 Ill. 492.

II.

IN TORT.

(34 LOUISIANA ANNUAL 1123, 44 AM. REP. 456.)

DELANEY vs. ROCHEREAU.

(Supreme Court of Louisiana, November, 1882.)

Action of damages, for negligence producing death. The death was caused by the falling of a gallery upon a building belonging to a foreign owner, and in charge of the defendants as his agents. The defendants had judgment below.

Jos. P. Hornor and *F. W. Baker,* for appellant.

C. E. Schmidt, for appellee.

BERMUDEZ, C. J. This is an action to hold agents liable to third parties for injury sustained in consequence of an alleged dereliction of duty, or non-feasance on their part. * * *

The contention is, that as the injuries received caused intense suffering, and as they were occasioned by the falling of the gallery, which was in very bad condition, to the knowledge of the defendants, who, as the agents of the owner, were bound to keep it in good order, and who without justification neglected to do so, their firm and each member thereof are responsible in *solido* for the damages claimed.

The theory on which the suit rests is, that agents are liable to to third parties injured, for their non-feasance.

In support of that doctrine, both the common and the civil law are invoked.

At common law an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent in the latter case, being liable to his principal only. For non-feasance or mere neglect in the performance of a duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he had become directly bound or amenable for his conduct.

Everyone, whether he is principal or agent, is responsible directly

to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract.

No man increases or diminishes his obligations to strangers by becoming an agent. If in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either by his negligence, in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations toward third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one except his principal to perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible.

The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong doing, therefore in an act, directly injures a stranger, then such stranger can recover from the agent damages for the injury. Story Agency, 308, 309; Story Bailm. 165; Shearm. & Redf. Neg. 111, 112, ed. 1874; Evans' Agency, notes by Ewell, 437, 438; Whart. Neg. 535, 78, 83, 780.

It is an error to suppose that the principle of the civil law, on the liability of agents to third persons, is different from those of the common law. It is certainly not broader.

While, treating of "negligence in discharge of duties not based on contract," which had not previously been considered, Wharton, beginning the third book of his remarkable work on Negligence, says:

"The Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care, is in *culpa* and is bound to make good the injury caused by his neglect. The general responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission, in *faciendo*. Thus an omission by a stranger to perform an act of charity is not *culpa;* it is *culpa*, however, to inadvertently place

obstacles on a road over which another falls and is hurt, to kindle a fire by which another's property may be burned, to dig a trench which causes another's wall to fall." He subsequently states that the following are cases in which no responsibility can possibly attach:

"When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, the liability ceases and the event is to be regarded as a casualty.

"If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished.

"*Quod quis ex sua culpa damnum sentit, non intelligitur sentire.*"—Pomponius. Whart. Neg. 780. 300.

The allusion made by certain writers to the Roman law, which gives a remedy in all cases of special damages, must necessarily be understood as referring to instances in which the wrong or damage is done, or inflicted by an actual wrong-doing or commission of the injuring party.

The article of the French Code, 1992, from which article 3003 of our R. C. C. derives, which is to the effect that the agent is responsible not only for unfaithfulness in his management, but also for his fault and mistake, contemplates an accountability to the principal only, and this by reason of the assumption of responsibility by the acceptance of the mandate. How indeed can an agent be responsible to a third person for the management of the affairs of his principal, or for a mistake committed in the administration of his property? The responsibility for fault is likewise in favor of the "mandant" alone.

The Napoleon Code, article 1165, contains the formal provision that agreements have effect only on the contracting parties; they do not prejudice third parties, nor can they avail them, except in the case mentioned in article 1121. This last article refers to stipulations in favor of *autrui*, which become obligatory when accepted.

The code of 1808 contained a corresponding article, but that of 1825 did not; neither does the revised code of 1870. It must not be concluded, however, that the omission to incorporate the provision in the subsequent legislation must be considered as a repudiation of the doctrine.

The distinguished compilers and framers of the code of 1825 account for the omission to reproduce because the provisions were already embodied in other articles, and might be deemed to be

exceptions to the undoubted rule that contracts can only avail or prejudice the parties thereto. *Projet du Code de* 1825, 264.

Quod inter alios actum est, aliis neque nocet, neque prodest. § L. 20, De instit. Act. See, also, Pothier on Oblig. Nos. 85, 87; Domat L. 1, t. 16, § 3, No. 8; L. 2, t. 8; Troplong Mand., No. 510; Duranton 10, No. 541; Toullier 6, 341; Toullier 7, 252, 306; Demolomle 25, No. 38; Laurent 10, No. 377; Larombiere, 1, 640.

That such is the case was formerly recognized by the court of Cassation of France, in the case of Thomassin, decided in July, 1869, and reported in part 1 of DALLOZ, J. G., for that year. The syllabus in the case is in the following words: "*Le mandataire n'est responsable des fautes qu'il commet dans l' exécution du mandat, qu' envers le mandant.*" See, also, J. G. Vo. Obl. nos. 878 *et seq.*, and Vo. Mandat, No. 213.

The case of *Beaugillot vs. Callemer*, 33 Sirey, 322, far from expounding a doctrine antagonistical to that prevailing, as was seen, at common law, and which we consider as well settled likewise under the civil law, is fully confirmatory of the same. It was the case of an agent condemned to pay damages for obstructing, by means of beams, a water-course partly closed up by masonry, and thus causing an overflow, in consequence of which a hay crop was damaged. The plea of respondeat superior, did not avail. The court well held that the commission of the act constituted a *quasi* offense, in justification of which the mandate could not be set up.

This anterior view of the case relieves the court from the necessity of passing upon the other questions presented, relative to fault, trespass, contributory negligence, suffering and damages.

Judgment affirmed with costs.

Judgment affirmed.

NOTE.—See, also, *Baird vs. Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504; *Ellis vs. McNaughton*, 76 Mich. 237; *Campbell vs. Portland Sugar Co.*, 62 Me. 562, 16 Am. Rep. 503; *Leuthold vs. Fairchild*, 35 Minn. 111.

(130 MASSACHUSETTS, 102, 39 AM. REP. 437.)

OSBORNE vs. MORGAN.

(Supreme Judicial Court of Massachusetts, January, 1881.)

Action of damages for personal injury by negligence. The opinion states the case. The defendant had judgment below.

G. F. Verry and *H. L. Parker,* for plaintiff.

W. S. B. Hopkins and *H. F. T. Blackmer,* for defendants.

GRAY, C. J. The declaration is in tort and the material allegations of fact, which are admitted by the demurrer, are that while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up by direction of the corporation certain partitions in a room in which the corporation was conducting the business of making wire, the defendants—one the superintendent, and the others, agents and servants of the corporation being employed in that business, negligently and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room and suffered them to remain there in such a manner and so unprotected from falling that by reason thereof they fell upon and injured the plaintiff. Upon these facts the plaintiff was a fellow-servant of the defendants. *Farwell vs. Boston & Worcester Railroad,* 4 Metc. 49, 38 Am. Dec. 339; *Albro vs. Agawam Canal,* 6 Cush. 75; *Gilman vs. Eastern Railroad,* 10 Allen, 233, 87 Am. Dec. 635; and 13 Id. 433, 90 Am. Dec. 210; *Holden vs. Fitchburg Railroad,* 129 Mass. 268, 37 Am. Rep. 343; *Morgan vs. Vale of Neath Railway,* 5 B. & S. 570, 736 and L. R. 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court delivered by Mr. Justice MERRICK in *Albro vs. Jaquith,* 4 Gray, 99, 64 Am. Dec. 56, in which it was held that a person employed in the mill of a manufacturing corporation who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskillfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But upon consideration we are all of the opinion that that judgment is supported by no satisfactory reasons and must be overruled.

The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for non-feasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only and not to any third person.

It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance. And it is doubtless true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly. Ulpian in Dig. 9, 2, 27, 9; *Parsons vs. Winchell,* 5 Cush. 592, 52 Am. Dec. 745; *Bell vs. Josselyn,* 3 Gray, 309, 63 Am. Dec. 741; *Nowell vs. Wright,* 3 Allen, 166, 80 Am. Dec. 62; *Horner vs. Lawrence,* 8 Vroom, 46.

Negligence and unskilfullness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance within the meaning of the rule relied on, than negligence in the control of fire as in the case in the Pandects; or of water as in *Bell vs. Josselyn*; or of a drawbridge as in *Nowell vs. Wright*; or of domestic animals as in *Parsons vs. Winchell,* and in the case in New Jersey.

In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with instruments in the defendants' actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall and who is not prevented by his relation to the defendants from maintaining the action.

Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract

with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence.

The fact that a wrongful act is a breach of a contract between the wrong-doer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. *Hawkesworth vs. Thompson,* 98 Mass. 77; *Norton vs. Sewall,* 106 Id. 143, 8 Am. Rep. 298; *May vs. Western Union Telegraph,* 112 Mass. 90; *Grinnell vs. Western Union Telegraph,* 113 Id. 299, 305, 18 Am. Rep. 485; *Ames vs. Union Railway,* 117 Mass. 541, 19 Am. Rep. 426; *Mulchey vs. Methodist Religious Society,* 125 Mass. 487; *Rapson vs. Cubitt,* 9 M. & W. 710; *George vs. Skivington,* L. R., 5 Exch. 1; *Parry vs. Smith,* 4 C. P. D. 325; *Foulkes vs. Metropolitan Railway,* 4 Id. 267 and 5 Id. 157. This case does not require us to consider whether a contractor or a servant who has completed a vehicle, engine or fixture, and has delivered it to his employer, can be held responsible for an injury afterward suffered by a third person from a defect in its original construction. See *Winterbottom vs. Wright,* 10 M. & W. 109; *Collis vs. Selden,* L. R., 3 C. P. 495; *Albany vs. Cunliff,* 2 Comst. 165; *Thomas vs. Winchester,* 6 N. Y. 397, 408, 57 Am. Dec. 455; *Coughtry vs. Globe Woolen Co.,* 56 N. Y. 124, 127, 15 Am. Rep. 389.

It was further suggested in *Albro vs. Jaquith,* that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation in some measure upon the extent of the hazard he assumes, and that "the knowledge that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work will

naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all."

The cases cited in support of these suggestions were *Farwell vs. Boston & Worcester Railroad,* 4 Metc. 49, and *King vs. Boston & Worcester Railroad,* 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with and receive no compensation from each other.

It may well be doubted whether a knowledge on the part of the servants that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice SHAW, in *Farwell vs. Boston & Worcester Railroad,* of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default, and was followed by the statement (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion), that the rule exempting the master from liability to one servant for the fault of a fellow servant did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty, and at a distance from each other. 4 Metc. 59–61.

So far as we are informed there is nothing in any other reported case, in England or in this country, which countenances the defendants position, except in *Southcote vs. Stanley,* 1 H. & N. 247; s. c., 25 L. J. (N. S.) Ex. 339; decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron POLLOCK and Barons ALDERSON and BRAMWELL severally delivered oral opinions at the close of the argument. According to one report, Chief Baron POLLOCK uttered this dictum: "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the

other report contains no such dictum, and represents Baron ALDERSON as remarking that he was "not prepared to say that the person actually causing the negligence" (evidently meaning "causing the injury" or "guilty of the negligence") "whether the master or servant would not be liable," 25 L. J. (N. S.) Ex. 340.

The responsibility of one servant for an injury caused by his own negligence to a fellow-servant was admitted in two considered judgments of the same court, the one delivered by Baron ALDERSON four months before the decision in *Southcote vs. Stanley,* and the other by Baron BRAMWELL eight months afterward. *Wiggett vs. Fox,* 11 Exch. 832, 839; *Degg vs. Midland Railway,* 1 H. & N. 773, 781. It has since been clearly asserted by Barons POLLOCK and HUDDLESTON. *Swainson vs. Northeastern Railway,* 3 Exch. D. 341, 343; and it has been affirmed by direct adjudication in Scotland, in Indiana and in Minnesota. *Wright vs. Roxburgh,* 2 Ct. of Sess. Cas. (3d series) 748; *Hinds vs. Harbou,* 58 Ind. 121; *Hinds vs. Overacker,* 66 Id. 547, 32 Am. Rep. 114; *Griffiths vs. Wolfram,* 22 Minn. 185.

Exceptions sustained.

NOTE.—See, also, *Hare vs. McIntire,* 82 Me. 240, 17 Am. St. Rep. 476.

CHAPTER IV.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT.

I.

AGENT'S RIGHT TO COMPENSATION.

(3 JOHNSON'S CHANCERY, 431, 1 AM. LEAD. CAS. 866.)

BRADFORD vs. KIMBERLY.

(New York Court of Chancery, September, 1818.)

Bill for accounting, etc. The opinion sufficiently states the facts.

Wells, for plaintiff.

Boyd, for defendants.

The Chancellor. It appears in proof that the owners of the cargo of the Edwardo, in January, 1814, appointed the defendants their agents to receive and sell the cargo, and distribute the proceeds. The defendants were at the same time part owners; but this special agency was altogether distinct from their ordinary powers as part owners, and they were to be considered, for this purpose, as agents for the company, and in that character they were entitled to their commissions or compensation, in the same manner as any other persons, being strangers in interest, would have been entitled under such an agency. In the case of joint partners, the general rule is, that one is not entitled to charge against another a compensation for his more valuable or unequal services bestowed on the common concern, without any special agreement, for it is deemed a case of voluntary management. This is the doctrine in the cases on this point. *Thornton vs. Proctor,* 1 Anstruther, 94; *Burden vs. Burden,* 1 Ves. & B. 170; *Franklin vs. Robinson,* 1 Johns. Ch. 157. But where the several owners meet, and constitute one of the concern an agent, to do the whole business, a

compensation is, necessarily and equitably, implied in such special agreement, and they are to be considered as dealing with a stranger. The defendants are, consequently, to be viewed as commission merchants to receive and sell the return cargo, and they are entitled to the rights belonging to that character.

If this conclusion be correct there is then no doubt that the claim on the part of the defendant must be admitted. It is well settled, that a factor may retain the goods or the proceeds of them, not only for the charges incident to that particular cargo, but for the balance of his general account; and this allowance is made out not only while the goods remain in *specie*, but after they are converted into money. This was the doctrine declared in *Kruger vs. Wilcox*, Ambler, 252, and afterwards, by Lord MANSFIELD, in *Godin vs. The London Assurance Co.*, 1 Burrows, 494, and by Mr. J. BULLER, in *Lickbarrow vs. Mason*, 6 East, 23, *in notis*. And it is further settled, that this lien applies not only for the amount of the money actually disbursed for the necessary use of the property in hand, and for acceptances actually paid, but for the amount of outstanding acceptances not then due. The factor may retain the goods, or the money into which they have been converted, until he is indemnified against the liability to which he has subjected himself. *Hammonds vs. Barclay*, 2 East, 227; *Drinkwater vs. Goodwin*, Cowp. 251. This is very equitable doctrine, especially when the acceptances and responsibilities were assumed, or necessarily presumed to have been assumed, upon the credit of the property in his possession. * * *

Bill dismissed, with costs.

NOTE.—An agent has a particular lien for his commissions, expenditures, advances and services in and about the property or thing entrusted to his agency. *McKenzie vs. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *McIntyre vs. Carver*, 2 Watts & Serg. (Penn.) 392, 37 Am. Dec. 519; *Grinnell vs. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; *Farrington vs. Meek*, 30 Mo. 581, 77 Am. Dec. 627; *Mathias vs. Sellers*, 86 Penn. St. 486, 27 Am. Rep. 723. An agent employed to obtain a loan upon a commission has a lien for the same upon the loan which he secures. *Vinton vs. Baldwin*, 95 Ind. 433. "An agent may have a lien on the property or funds of his principal for moneys advanced or liabilities incurred in his behalf; and if moneys have been advanced or liabilities incurred upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances or liabilities are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, within every principle of equity the agent has a lien upon the same for his protection and indemnity." *Muller vs. Pondir*, 55 N. Y. 325.

(29 PENNSYLVANIA STATE, 184, 72 AM. DEC. 620.)

WALLACE vs. FLOYD.

(Supreme Court of Pennsylvania, 1857.)

Floyd sued Wallace for services as clerk, seeking to recover on a *quantum meruit*. Wallace alleged that the services were rendered under a special contract fixing the rate.

Bigham and *Watson*, for plaintiff in error.

Penny and *Sterrett*, for defendant in error.

ARMSTRONG, J. (After stating the facts and disposing of a question of practice).

I know of no standard of value that could be more satisfactory than that which the parties fix for themselves, and where there is a special contract, fixing the terms and conditions on which one party shall serve another, in the absence of proof rescinding or altering it, it is conclusive. If a tenant holds over without notice to quit, or a new contract, the terms and conditions of his old lease will govern. So if a man agrees to serve another for a month or year, at a stipulated sum per month or year, and silently continues longer in the service, it will be on the old terms.

If there was a special contract existing, it was the duty of Floyd to give notice to his employer if he wished to alter or enlarge its terms; and it would then have been incumbent on Wallace to accede to the demand or terminate the service. The court said, in answer to the defendant's offer: "The inquiry is as to the value of plaintiff's services, and not as to the contract price; and, so far as the evidence may tend to show their value, it is admitted." From this the jury might very readily suppose that the "contract price" was excluded, and that it was only the other evidence in the cause from which they could fix the value. If no contract was proved, this might be correct. But if there was a special agreement, as is alleged, not changed or rescinded, it would control; and it was error to mingle it with other evidence to enhance the value.

Judgment reversed, and *venire de novo* awarded.

(58 NEW HAMPSHIRE, 392.)

WILSON vs. DAME.

Assumpsit. The opinion states the facts.

Page, for the plaintiff.

Hodgdon and *Hatch*, for the defendant.

BINGHAM, J. The facts reported by the referee establish (1) that the defendant, city marshal of Portsmouth, desired to arrest Walters; (2) that the plaintiff rendered necessary and valuable services in accomplishing it, as the defendant's servant or agent, expecting to be paid for them; (3) that the defendant, knowing these facts, accepted the services, intending to pay for them, and afterwards, on receiving the reward, promised the warden that he would do so.

If a person acts as an agent, without authority, and the principal, after full knowledge of the transaction, ratifies it, it will be his act, the same as if he had originally given the authority; and the agent will be entitled to the same rights and remedies, and to the same compensations, as if he had acted within the scope of an acknowledged original authority. Story on Agency, § 244.

If the case does not show an original employment of the plaintiff, or a request to assist in the arrest and return of the convict, it clearly shows that the defendant accepted and ratified whatever the plaintiff did, and that the defendant is liable to pay a reasonable compensation for the same. *Hatch vs. Taylor*, 10 N. H. 538, (*ante*, p. 345); *Low vs. Railroad*, 45 N. H. 370; s. c. 46 N. H. 284.

Judgment on the report.

(61 NEW YORK, 362, 19 AM. REP. 285.)

HOWARD vs. DALY.

(New York Court of Appeals, January, 1875.)

Action for the breach of an alleged contract of employment.

Plaintiff alleged that on the 20th of April, 1870, she contracted with defendant to serve him as an actress at his theater in New York for the season commencing on or about September 15, 1870,

and terminating on or about July 1, 1871, at ten dollars a week. That at the proper time she appeared and offered to enter upon such service, but was prevented by defendant. The answer was a general denial.

The reference found the facts substantially as alleged by the plaintiff, and that plaintiff was entitled to judgment for $410. The other facts are sufficiently stated in the opinion.

Richard M. Henry, for appellant.

Spencer L. Hillier, for respondent.

DWIGHT, C. It is insisted by the defendant that the complaint in this cause should have been dismissed, on the ground that the plaintiff made and maintained no proper tender of service. The finding of the referee that the plaintiff offered and tendered performance of her part of the contract, but that the defendant repudiated the contract, and thereby prevented the plaintiff from performing her part of it, is said to be unsustained by the evidence, and to be erroneous.

As this is substantially the whole question raised by the defendant on this appeal, it will be the most convenient way to discuss it, to consider the effect of the acts of the defendant denying the existence of the contract. The fact that there was a valid contract has been found by the referee. The evidence showed that a proposal, in writing, was made by Mr. Daly to the plaintiff for an engagement of her services for the year 1869. The plaintiff testifies that she signed an acceptance on Saturday, April 13, 1870, and placed it in the letter box of the defendant, at the theater. The defendant admits that this letter box was sometimes used as a place for deposit of the duplicates of contracts made between him and the actors. It is true that he testified that he never received the papers which the plaintiff asserts that she deposited in the box. This, however, is immaterial. The minds of the parties met when the plaintiff complied with the usual, or even occasional practice, and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. *Vassar vs. Camp,* 11 N. Y. 441; *Trevor vs. Wood,* 36 Id. 307, 93 Am. Dec. 511. The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act. *White vs. Corlies,* 46 N. Y. 467. The deposit in the box, under the circumstances of the present case is such an act.

The case may also be rested upon the fact there was evidence to lead to a presumption that the document reached the defendant, as it was placed in a receptacle considered by him to be a suitable one for the deposit of documents of this class. In the ordinary course of business it would reach the defendant, as he would be supposed to have competent attendants in charge to transact his business. His denial that he received it simply raises a case of conflict of evidence, on which the referee has passed in the plaintiff's favor. In *Dana vs. Kemble,* 19 Pick. (Mass.) 112, it appeared that it was the usage of a hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they were sent, almost every fifteen minutes throughout the day, to the rooms of the different guests to whom they were directed. It was held that there was a presumption that a letter addressed to one of the guests left at the bar was received by him. The same point was ruled, in substance, in *Hetherington vs. Kemp,* 4 Camp. 192, where a letter was placed on a table where letters were usually placed to go to the post-office. The court held that this would be sufficient if it were proved that they were usually carried to the post-office. Though no strict usage was established in the case at bar, there was enough proved to show that, in the ordinary course of business, the letter addressed to him by the plaintiff was likely to reach him.

The evidence bearing upon the referee's finding that the defendant repudiated the contract thus formed, is substantially as follows: At the end of August or at the beginning of September, 1870, the plaintiff saw the defendant's posters in the street, with a list of his company. Not seeing her name, she wrote to the defendant for an explanation, but received no answer. She then went to the theater, where she met the defendant and asked him why he had not answered her letter, to which inquiry he replied that he had answered it; that it was lying in the box office of the theater for her and had not been sent to her because he expected she would call for it. The defendant then handed her the letter, which bore date August 31st, and which stated that he was not aware of making any engagement with the plaintiff for the present season, and that he certainly had no contract with her. After she had read this letter, she said to the defendant that she had his paper of engagement. He seemed quite surprised, and said that he had not got hers, knew nothing about it, and had not engaged her. On her cross-examination, the plaintiff testified that the conversation just detailed occurred the day after the theater opened.

The defendant gives a version of the interview not materially different. He says that some time after the issue of the preliminary poster, stating the announcement of the season of 1870–71, the plaintiff called on him and wished to know why her name was not on the poster, and he replied because she was not a member of the company. She then stated that she had signed a contract, and he then called her attention to a notice which he had issued requiring an acceptance by a particular day, and stated that he had not received hers. The treasurer of the defendant (Mr. Appleton), who heard the conversation, says that the plaintiff, having asked why her name was not on the poster, the defendant answered, it was because she had not complied with the notice put up in his green-room; and, there not being any contract, he could not announce her as one of the company.

This testimony shows that the defendant unequivocally refused to recognize the contract. After the plaintiff's statement, he positively declined to receive her as one of the company. The evidence is not perfectly distinct on the point whether the plaintiff's duties had commenced at the time when the defendant's denial of the contract was made. This may, perhaps, be inferred from a statement made by her on cross-examination, that the conversation occurred the day after the theater was opened. As the matter, however, remains in some doubt, the subject will be examined from both points of view.

1. I shall first consider the question on the supposition that the plaintiff's period of service had already arrived, and that, on her application for permission to fulfill her contract, the defendant repudiated his obligations.

No precise form of words was necessary on his part to reject her services; the obligation of the contract being created, a denial of its existence was equivalent to a refusal to allow her to enter upon the services. The defendant's intent is plain. He might reject her services indirectly as well as directly. The sole inquiry is, whether he has done an act *inconsistent* with the supposition that the service continues. In the case of *Short vs. Stone*, 8 Ad. & Ell. (N. S.), 358, it was held that if a man promised to marry a woman on a future day, and before that time married another, he had broken the contract with the first woman. This was on the ground that the act done was inconsistent with the contract relations of the parties. See, also, *Lovelock vs. Franklyn*, 8 Ad. &

Ell. (N. S.), 371. I think, accordingly, that the refusal of the defendant to recognize the contract was equivalent to a refusal to continue the plaintiff in his employment.

The next point is, whether the plaintiff was bound, notwithstanding the defendant's act, to keep herself in readiness to perform the contract at all times, or in any form to tender her services. This inquiry involves the correct theory of the nature of the action. Does the plaintiff sue for wages on the hypothesis of a constructive service, or for damages? This question, as far as it appears, has never been fully discussed in the appellate courts of this State; and, on account of both its novelty and importance, will be considered at length.

It is very plain, that if a servant has actually performed the service which he has agreed to render under the contract, he has a right to recover *wages*. That would have been true in the case at bar if the defendant had received her services for the stipulated period. Had he not paid her according to the agreement, her action would have been for the fixed wages. If, on the other hand, she is wrongfully discharged, and the relation of master and servant is broken off as far as he is concerned, it is clear that she cannot recover for wages in the same sense as if she had actually rendered the service. In an early *nisi prius* case the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages. *Gandell vs. Pontigny*, 4 Campb. 375, see, also, *Collins vs. Price*, 4 Bing. 132. This view has been discarded in later decisions, and has been disapproved by text writers. *Archard vs Hornor*, 3 Carr. & Payne, 349; *Smith vs. Hayward*, 7 Ad. & Ell. 544; *Aspdin vs. Austin*, 5 Ad. & Ell. (N. S.) 671; *Fewings vs. Tisdal*, 1 Exch. 295; *Elderton vs. Emmens*, 6 Com. Bench, 178; *Goodman vs. Pocock*, 15 Ad. & Ell. (N. S.) 582; Mr. Smith's notes to *Cutter vs. Powell*, 2 Smith's Leading Cases, 20; C. M. Smith on the law of master and servant, p. 95, note g; *Whitaker vs. Sandifer*, 1 Duvall (Ky.), 261; *Chamberlin vs. McCallister*, 6 Dana, 352; *Clark vs. Marsiglia*, 1 Den. 317, 43 Am. Dec. 670; *Durkee vs. Mott*, 8 Barb. 423; *Moody vs. Leverich*, 4 Daly, 401.

These cases and authorities hold, in substance, that if a servant be wrongfully discharged, he has no action for *wages*, except for past services rendered, and for sums of money that have become due. As far as any other claim on the contract is concerned, he

must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon. Smith on Master and Servant, 96, note *n*; *Elderton vs. Emmons*, 6 Com. Bench, 187; *Beckham vs. Drake*, 2 Ho. Lords Cases, 606. A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a *quantum meruit*, for services actually rendered. These remedies are independent of and additional to his right to sue for *wages*, for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed, either in full or in a specified part, the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge.

To apply these principles to the case at bar, the plaintiff must have been ready and willing to continue in the defendant's service at the time of the latter's refusal to receive her into his employment. 2 Wms. Saund. 352, *et seq.*, note to *Peeters vs. Opie*. It is not necessary, however, that she should go through the barren form of offering to render the service. *Wallis vs. Warren*, 4 Exch. 361; *Levy vs. Lord Herbert*, 7 Taunt. 314; *Carpenter vs. Holcomb*, 105 Mass. 284, and cases cited in opinion by COLT, J. Her readiness, like any other fact, may be shown by all the circumstances. It sufficiently appeared by the contract of the parties.

After the defendant had declined to give her employment, there was no further duty on the plaintiff's part to be in readiness to perform. If that readiness existed when the time to enter into service commenced, and the defendant committed a default on his part, the contract was broken and she had a complete cause of action, Tender of performance is not necessary when there is a willingness and ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. *Franchot vs. Leach*, 5 Cow. 506; *Cort vs. Ambergate* and *R. R. Co.*, 17 A. & E. (N. S.) 127. This rule is recognized in *Nelson vs. Plimpton Fireproof E. Co.*, 55 N. Y. 480, 484. Her future conduct could not affect her right to sue, though it might bear on the question of damages. She was not obliged to remain in New York, or in any form to tender her services after they had been once definitely rejected.

If this theory of the plaintiff's case is correct, her only further

duty was to use reasonable care in entering into other employment of the same kind and thus reduce the damages. This obligation is of a general nature, and not peculiarly applicable to contracts of service. The cases on this point are: *Emmons vs. Elderton,* 4 H. L. Cas. 646; *Costigan vs. Mohawk & H. R. R. Co.,* 2 Den. 609, 43 Am. Dec. 758; *Dillon vs. Anderson,* 43 N. Y. 231. *Hamilton vs. McPherson,* 28 Id. 76, 84 Am. Dec. 330. The uncontradicted testimony was, that this duty was discharged by the plaintiff. She made effort to procure employment, but failed. While it would be unquestionably her duty to accept, if offered, another eligible theatrical engagement, it could scarcely be expected that she should spend much time in actively seeking for employment. Having made some effort and having failed, I think she was justified, under the known usage in that business of forming companies of actors at certain seasons of the year, and the slight prospect of success in making an engagement after the 15th of September, in awaiting the close of the theatrical season. How far a person who is wrongfully discharged from employment is bound to seek it, is not, perhaps, fully settled. *Chamberlain vs. Morgan,* 68 Penn. St. 168; *King vs. Steiren,* 44 Id. 99. In the first of these cases it is said that it is the duty of a dismissed servant not to remain idle, and that the defendant may show, in mitigation of damages, that the plaintiff might have procured employment. This seems to be a reasonable rule. *Prima facie,* the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or, at least, that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found. 2 Greenl. on Ev. § 261*a*; *Costigan vs. M. & H. R. R. Co.,* 2 Den. 609, 43 Am. Dec. 758.

No such evidence having been offered by the defendant, the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of contract. This, as has been seen, is the true measure of damages. *Clossman vs. Lacoste,* 28 E. L. and Eq. 140; *Goodman vs. Pocock,* 15 Ad. & El. 576; *Smith vs. Thomson,* 8 C. B. 444; Smith on Master and Servant, 98.

Some of the cases which may appear to conflict with this opinion,

or which are at variance with it, will now be briefly reviewed. *Taylor vs. Bradley*, 39 N. Y. 129, 100 Am Dec. 415, is not opposed. The only point decided in that case was, that if there be an agreement to let a farm for three years on specified terms, the plaintiff stipulating to occupy and work the farm, and to divide the proceeds with the defendant, the owner, and the latter breaks off the agreement, without cause, at the commencement of the letting, the plaintiff may recover immediately as damages, the value of the contract. This proposition is entirely consistent with the views maintained in the present case, though they are *dicta* in the case not easily reconcilable with the result reached by the court. Pp. 141, 142. *Polk vs. Daly*, 4 Daly, 411, is supposed by the defendant to support his views. This is a clear mistake. The court expressly approves *Moody vs. Leverich* in the same volume. (P. 416.) This case is most distinct and emphatic in the plaintiff's favor. *Polk vs. Daly* simply argues the question as one of wages. The plaintiff in that case tendered his services *before* the time for his employment arrived, and was discharged. (It will appear hereafter that in a case where a servant is discharged from his contract before the time of service arrives, he has an election to wait until the contract day arrives and then tender his services, or to sue at once for damages.) He then left the city of New York and remained absent until the whole period had expired, making no efforts to obtain employment. The court held that if the action were for *wages*, he must hold himself in readiness to render the service. This is correct. No opinion was expressed upon the point as to what the rule would have been in an action for *damages*.

As far as any authorities are opposed to the theory maintained in the present case, they will appear to rest on the *nisi prius* case of *Gandell vs. Pontigny*, already noticed. Thus in *Thompson vs. Wood*, 1 Hilt. 96, there is a *dictum* of INGRAHAM, J., that a servant wrongfully discharged has his election to sue for wages as they become due from time to time, or for damages. This remark that he could sue for *wages* evidently proceeds on the discarded doctrine of "constructive service." In *Huntington vs. The Ogdensburgh R. R. Co.*, 33 How. Pr. 416, there are some remarks of a similar nature by POTTER, J., though there is an apparent confusion between a claim for wages, in case the contract is carried out, and for damages, in case it is broken off. The opinion of JAMES, J., as reported in this case in 7 American Law Register (N. S.) 143, appears to be distinct in its adoption of the doctrine of construc-

tive service. It relies on a case in Alabama (*Fowler vs. Armour*, 24 Ala. 194), which distinctly holds that doctrine, and on the dictum of INGRAHAM, J., in *Thompson vs. Wood*, *supra*. There are two or three other cases in the southern and western states that have followed *Gandell vs. Pontigny: Armfield vs. Nash*, 31 Miss. 361; *Gordon vs. Brewster*, 7 Wis. 355; *Booge vs. Pacific R. R. Co.*, 33 Mo. 212, 82 Am. Dec. 160.

This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept another employment, while another rule required him to remain idle in order to recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for damages, which were *prima facie* a sum equal to the stipulated amount, unless the defendant should give evidence in mitigation of damages. * * *

[The learned commissioner then considered the rule to be followed in case the defendant's denial of the contract preceded the time for entering into the service, expressing the opinion that the plaintiff would then have an immediate right of action.—This is omitted, as it was not concurred in.]

The whole result of the discussion may now be summed up. If the defendant in the case at bar repudiated his contract with the plaintiff *after* the time of performance had arrived, the plaintiff had an action for damages. Her interview with the defendant sufficiently showed her readiness to perform. Her action was for damages for not being permitted to work, and not for wages; and

the defendant might show affirmatively, and by way of mitigation of damages, that she had opportunities to make a theatrical engagement elsewhere, which she did not accept. Without such proof she was entitled to recover the full amount of the compensation stipulated in the contract.

On the other hand, if the defendant rejected the services of the plaintiff *before* the time for performance arrived, she had an election either to consider his act as a breach of an implied contract with her to take her into his service, and bring an immediate action; or to wait till the appointed day arrived, and then be in readiness to render her services. Her election will be evidenced by her acts. Having made no tender of her services at the appointed day, the presumption is that she considered the act of repudiation by the defendant as final, and now brings her action for damages. Her complaint in the action and the evidence taken at the trial are sufficient to establish such a claim. Her damages are, as in the other hypothesis, *prima facie* the entire amount of her compensation, unless proof was offered in mitigation of damages, which was not done. In either aspect of the case the verdict and judgment were right.

My brethren concur with me upon the first ground discussed in this opinion, without expressing their views upon the correctness of the rule laid down in *Hochster vs. De La Tour* and kindred cases.

The judgment of the court below must be affirmed.

All concur.

Judgment affirmed.

(84 ALABAMA, 508, 5 AM. ST. REP. 387.)

LIDDELL vs. CHIDESTER.

(Supreme Court of Alabama, December, 1887.)

Action to recover for services rendered. Plaintiff recovered below.

Arlington & Graham, for the appellant.

Troy, Tompkins & London, contra.

STONE, C. J. The most important inquiry in this case, alike of law and of fact, was whether Chidester was employed by Liddell to

perform a year's service for one thousand dollars, to be paid in gross, or to be paid in monthly installments. If the former, then the recovery and enforcement of the judgment for a part of the demand in June, 1886, is a complete defense and bar to this action, and nothing should be recovered. This, under the well-known principle that a plaintiff cannot split up a single cause of action into two or more suits; and if he does so, and recovers a part of his demand, this is a waiver of, and a bar to the residue of his claim, be it much or little. *Oliver vs. Holt*, 11 Ala. 574, 66 Am. Dec. 228; *O'Neal vs. Brown*, 21 Ala. 482; *S. & N. R. R. Co. vs. Henlein*, 56 Id. 368; *Wharton vs. King*, 69 Id. 365.

If, on the other hand, the wages were due and demandable at the end of each month, then the recovery of one installment, unreversed, is a complete answer to and preclusion of all defense to the merits which were or could be pleaded to such second suit. *Rakes vs. Pope*, 7 Ala. 161; 3 Brickell's Digest, p. 580, sec. 75 *et seq.*; Wharton on Civil Evidence, sec. 758; *Gardner vs. Buckbee*, 3 Cow. 120; 15 Am. Dec. 256.

The contract in this case was by telegraphic correspondence. Liddell's offer was: "If one thousand dollars a year is an inducement, come immediately. Answer." Chidester's acceptance was: "Will accept one thousand dollars a year." These communications, unexplained, show a single contract for a year, the wages to be one thousand dollars in gross.

There was testimony that up to the time of Chidester's discharge his wages were paid to him monthly; but the testimony on this subject was somewhat in conflict. *Partridge vs. Forsyth*, 29 Ala. 200; *Com. Fire Ins. Co. vs. Capital City Ins. Co.*, 81 Id. 320, 60 Am. Rep. 162. * * *

It is settled in this state, by many decisions, that when Chidester was discharged he had the option of one of three remedies, if the discharge was wrongful. 1. He could have elected to treat the contract as rescinded, and sue on a *quantum meruit* for any labor he may have performed. 2. He could have sued at once for an entire breach of the contract by the defendant, in which event he would have been entitled to recover all damages he suffered up to the trial, not exceeding the entire wages he could have earned under the contract; or 3. He could have waited until his wages would mature under the terms of the contract, and sue and recover as upon performance on his part. Each of these alternative rights, as we have seen, was dependent on his fixing on Liddell the fault

of his discharge. *Strauss vs. Meertief,* 64 Ala. 299; 38 Am. Rep. 8; *Davis vs. Ayers,* 9 Ala. 292; *Ramey vs. Holcombe,* 21 Id. 567; *Fowler vs. Armour,* 24 Id. 194; *Holloway vs. Talbot,* 70 Id. 389; *Wilkinson vs. Black,* 80 Id. 329; 3 Wait's Actions and Defenses, 606. And when wages are payable in installments, suits may be brought on the several installments as they mature; *Davis vs. Preston,* 6 Ala. 83. * * *

Affirmed.

(82 GEORGIA 392, 5 L. R. A. 405.)

GRIGGS vs. SWIFT.

(Supreme Court of Georgia, July, 1889.)

The firm of George P. Swift & Son hired Griggs for one year from Sept. 1, 1886, at $50 per month and board. The son died in November, and on January 1 following the surviving member discharged Griggs without cause. He brought this action against the survivor to recover wages and expenses for board from Jan. 1 to July 1, when he found other employment. Judgment below for defendant.

T. W. Grimes and *Peabody, Brannon & Hatcher,* for plaintiff in error.

McNeill & Levy, for defendant in error.

BLECKLEY, C. J. (After stating the facts.) From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties should be regarded as having by implication intended a condition dependent on the one hand, upon the life of the employé, and on the other, upon the life of the partnership, provided the death in either case was not voluntary. To this effect is the text of Wood on Master and Servant, § 163: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that the servant is absolved therefrom; but if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom; but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law and not from the act of the parties,

no action for damages will lie. * * * So if a firm consists of two or more persons and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties."

Mr. Wood's reference is to two Scotch cases which we have not seen, but the rule he deduces from them is so reasonable that we feel warranted in accepting it as law. See also *Tasker vs. Shepherd*, 6 H. & N. 575. As to the death of a person not a partner, but a sole employer, [the rule is the same.] See *Yerrington vs. Greene*, 7 R. I. 589, 84 Am. Dec. 578; Wood, Mas. & Ser. §§ 95, 158. The case of *Fereira vs. Sayres*, 5 Watts & S. (Pa.) 210, 40 Am. Dec. 496, is apparently in conflict with the text of Wood as above quoted, but we are satisfied to abide by the rule laid down in Wood, though it be at the expense of differing with the learned court of Pennsylvania by whom the last named case was decided. The contract upon which the plaintiff's suit was founded having become impossible of performance by reason of death, he had no right to recover upon the same against the surviving partner for services never actually rendered, and there was no error in granting a non-suit. Of course the claim for board was on the same footing as that for wages. Affirmed.

NOTE. **Compare with *Hughes vs. Gross*, 166 Mass. 61; 55 Am. St. Rep. 375.**

(37 OHIO STATE, 396, 41 AM. REP. 528.)

BELL vs. McCONNELL.

(Supreme Court of Ohio, January, 1881.)

Action for the recovery of commissions as a broker. The opinion states the facts.

R. B. Murray, for plaintiff in error.

George F. Arrel, for defendant in error.

MCILVAINE, J. This case presents the single question: Can a real estate broker, who assumes to aid both contracting parties in

making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay in a case where each principal had full knowledge of and assented to the double employment?

It has been decided (*Rupp vs. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; and *Siegel vs. Gould*, 7 Lans. 177), and is not doubted that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear, both upon principle and authority, that in case of such double employment he can recover from neither, where his employment by either is concealed from or not assented to by the other. Several reasons may be given for this rule. In law as in morals, it may be stated that as a principle no servant can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other. Luke, 16:13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Therefore by engaging with the second he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact disable himself from rendering to the first employer the full *quantum* of service contracted for, at least tempts himself not to do so. And for the same reason he cannot recover from the second employer who is ignorant of the first engagement. And if the second employer has knowledge of the first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the right of the first employer. It is no answer to say that the second employer having knowledge of the first employment should be held liable on his promise, because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals and both parties thereto being in *pari delicto*, the law will leave them as it finds them. *Ex dolo malo non oritur actio.*

The non-liability of the second employer having knowledge of the first employment has been maintained in the following cases: *Farnsworth vs. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker vs. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Smith vs. Townsend*, 109 Id. 500; *Rice vs. Wood*, 113 Id. 133, s. c. 18 Am. Rep. 459, *ante*, p. 12; *Bollman vs. Loomis*, 41 Conn. 581; *Everhart vs. Searle*, 71 Penn. St. 256; *Morrison vs. Thompson*,

L. R., 9 Q. B. 480. But in each of these cases it is strongly intimated, if not distinctly announced, that a recovery may be had by such agent when he acted with the knowledge and consent of both principals. In *Lynch vs. Fallon*, 11 R. I. 311; s. c., 23 Am. Rep. 458, the same general doctrine is held and it is said that a broker, acting at once for both vendor and purchaser, assumes a double agency disapproved of by the law, and which if exercised without the full knowledge and free consent of both parties is not to be tolerated. The same in *Meyer vs. Hanchett*, 43 Wis. 246, wherein the question whether such double agency is consistent with public policy, though exercised with the consent of both parties, is left undecided, but it is decided that mere knowledge of such double agency without actual consent on the part of the principals will not entitle the agent to commissions.

The validity of such contracts of double agency where all the principals were fully advised and consented to the double employment, was more directly before the courts and affirmed in the following cases: *Rome vs. Stevens*, 35 N. Y. Super. Ct. 189, 53 N. Y. 621; *Alexander vs. N. W. C. University*, 57 Ind. 466; *Joslin vs. Cowee*, 56 N. Y. 626; *Adams Mining Co. vs. Senter*, 26 Mich. 73; *Fitzsimmons vs. Southwestern Ex. Co.*, 40 Ga. 330, s. c. 2 Am. Rep. 577; *Rolling Stock Co. vs. Railroad*, 34 Ohio St. 450; *Pugsley vs. Murray*, 4 E. D. Smith, 245. See also note by Bennett to *Lynch vs. Fallon*, 16 Am. L. Reg. 333.

Raisin vs. Clark, 41 Md. 158, 20 Am. Rep. 66, holds the contrary doctrine, if knowledge and consent on the part of the first employer is to be regarded as fully proved. Other cases bearing more or less directly on the point might be cited; but enough are given to show a want of harmony in the decisions; yet we think the decided current of authority is in favor of the validity of such contracts where the consent of both principals to such double agency is clearly proved.

We admit that all such transactions should be regarded with suspicion; but where full knowledge and consent of all parties interested are clearly shown we know of no public policy, or principle of sound morality which can be said to be violated. It seems to us rather that public policy requires that contracts fairly entered into by parties competent to contract should be enforced where no public law has been violated and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which

could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud; a fair and valuable service in which his best judgment and his soundest discretion are fully and freely exercised. And in such case, such service is all that either of his principals contracted for. Undoubtedly if two persons desire to negotiate an exchange or a bargain and sale of property, they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers, an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment, and the one in the present case, which should cause the law to favor the former and abhor the latter? I can see none.

True, in the case put, the contracting parties deal directly with each other, and in the case at bar their minds meet through the medium of a third person in whose judgment and discretion they mutually repose confidence. His judgment and discretion are invoked by each to aid in fixing the terms of a contract between them. And after the terms are thus adjusted through the aid of their mutual agent and ratified by the parties, in the free exercise of their own volitions, to hold that the relation between such agent and either of his principals is in violation of a sound public policy supposed to rest on some moral abstraction would be a refinement in legal ethics too subtle for my comprehension.

Of course to relieve such double agent from suspicion that inconsistent duties have been assumed, which *prima facie* will be presumed, it is necessary that it should appear that knowledge of every circumstance connected with his employment by either, should be communicated to the other in so far as the same would naturally affect this action; but when that is done and free assent is given by each principal to the double relation of the agent, the right of such agent to compensation cannot be denied on any just principle of morals or of law.

Judgment of District Court affirmed.

LONGWORTH, J., dissented.

II.

AGENT'S RIGHT TO REIMBURSEMENT AND INDEMNITY.

(5 BINNEY, 441, 1 AM. LEAD. CAS. 856.)

D'ARCY vs. LYLE.

(Supreme Court of Pennsylvania, March, 1813.)

Plaintiff as agent of defendant had been employed to recover goods of defendant from Suckley & Co. at Cape Francois, San Domingo. He secured the goods by judicial proceedings and accounted to defendant. Afterwards the matter was reöpened, and plaintiff was given the alternative of paying a large sum because of his having obtained these goods or engage in personal combat to the death with the claimant Richardson. He therefore confessed judgment for $3,000, which it was claimed was the value of the goods, and the sum he afterwards paid. The action was for reimbursement from defendant. Verdict for plaintiff and defendant moved for a new trial.

Tod and *Rawle,* for the motion.
Hare and *Tilghman, contra.*

TILGHMAN, C. J. This is one of those extraordinary cases arising out of the extraordinary situation into which the world has been thrown by the French revolution. If the confession of judgment by the plaintiff had been *voluntary,* it would have lain on him to show that the $3,000 were justly due from the defendant to Richardson, or the persons for whom he acted, or they had a lien on the goods of the defendant to that amount. But the confession of judgment was *beyond all doubt* extorted from the plaintiff by duress, and he did not yield to fears of which a man of reasonable firmness need be ashamed. The material fact on which this case turns is, whether the transactions between the plaintiff and Richardson, were on any *private* account of the plaintiff, or solely on account of the defendant. That was submitted to the jury, and we must now take for granted that the proceedings at the Cape against the plaintiff, were in consequence of his having received possession of the defendant's goods from Suckley & Co. I take the law to be as laid down by Heineccius, Turnbull's Heineccius, c. 13, p. 269, 270, and by Erskine in his Institutes, 2 Erskine's Inst. 534,

that damages incurred by the agent in the course of the management, of the principal's affairs, or in consequence of such management, are to be borne by the principal.

It is objected that at the time when judgment was rendered against the plaintiff, he was no longer an agent, having long before made up his accounts, and transmitted the balance to the defendant. But this objection has no weight, if the judgment was but the consummation of the proceedings which were commenced during the agency. As such I view them, and I make no doubt that they were so considered by the jury. It is objected again, that no man is safe if he is to be responsible to an unknown amount, for any sums which his agent may consent to pay, in consequence of threats of unprincipled tyrants in foreign countries. Extreme cases may be supposed, which it will be time enough to decide when they occur. I beg it be understood, that I give no opinion on a case where an agent should consent to pay a sum far exceeding the amount of the property in his hands. This is not the present case, for the property of the defendant, in the hands of the plaintiff in 1804, was estimated at $3,000. The cases cited by the defendant show, that if the agent on a journey on business of his principal, is robbed of *his own money*, the principal is not answerable. I agree to it, because the carrying of his own money was not necessarily connected with the business of his principal. So if he receives a wound, the principal is not bound to pay the expenses of his cure, because it is a personal risk which the agent takes upon himself. One of the defendant's cases was, that where the agent's horse was taken lame the principal was not answerable. That I think would depend upon the *agreement of the parties.* If A undertakes for a certain sum, to carry a letter for B to a certain place, A must find his own horse and B is not answerable for any injury which may befall the horse in the course of the journey. But if B is to find the horse, he is responsible for the damage. In the case before us, the plaintiff has suffered damage without his own fault, *on account of his agency*, and the jury have indemnified him to an amount, very little if at all exceeding the property in his hands, with interest and costs. I am of opinion that the verdict should not be set aside.

Yeates, J., concurred; Brackenridge, J., dissented.

Note.—Damages incurred by the agent without his fault in the honest discharge of the principal's business must be borne by the principal. *Maitland vs. Martin* (1878) 86 Penn. St. 120. It is the right of an agent to be

re-imbursed all his advances, expenses and disbursements made in the course of his agency on account of or for the benefit of his principal. *Ruffner vs. Hewitt* (1871), 7 W. Va. 585. In *Bibb vs. Allen*, 149 U. S. 481, it is said: "It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. If, in obeying the instructions or orders of the principal, the agent does acts which he does not know at the time to be illegal, the principal is bound to indemnify him, not only for expenses incurred, but also for damages which he may be compelled to pay to third parties. The exception to this rule is where the transaction for which the agent is employed is illegal or contrary to good morals and public policy. Addison on Contracts, § 636; Story on Agency, §§ 339, 340, and cases cited in notes. Thus in *Beach vs. Branch*, 57 Ga. 362, where an agent had sold cotton for account of another, and was obliged to refund the purchase money to the purchaser on account of false packing by the principal, he was allowed to recover the amount so paid from the principal.

It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it. So that the employment of a broker to sell property for future delivery implies not only an undertaking to indemnify the broker in respect to the execution of his agency, but likewise implies a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or may result from the performance of his agency. *Bayley vs. Wilkins*, 7 C. B. 886; *Smith vs. Lindo*, 5 C. B. N. S., 587."

CHAPTER V.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THIRD PERSONS.

I.

LIABILITY OF PRINCIPAL IN CONTRACT.

1. *Undisclosed Principals.*

(15 EAST, 62, 2 SMITH'S LEAD. CAS. 342.)

PATERSON vs GANDASEQUI.

(English Court of King's Bench, Hilary Term, 1812.)

Defendant was a Spanish merchant, who, being in London, employed Larrazabal & Co., merchants there, to buy goods for him for a commission. Larrazabal & Co. requested plaintiffs, who were dealers, to send samples to the counting house of the former, and they did so. Defendant was present and the samples were handed over to him. He selected samples of such goods as he wanted, obtained terms and prices and went away. He afterwards instructed L. & Co. to buy large quantities for him and they sent written orders to plaintiffs for the goods, signed by themselves. Plaintiff sold the goods on the credit of Larrazabal & Co., made the invoices to them and charged to them the goods. Larrazabal & Co. charged defendant with the amount on their books. Before the term of credit had expired, Larrazabal & Co. became insolvent, and plaintiffs sought to hold defendant liable. On the trial, Lord ELLENBOROUGH, C. J., directed a non-suit on the ground that plaintiff had dealt solely with Larrazabal & Co. A rule to show cause why a new trial should not be granted was then obtained.

The Attorney General, Marryatt and *Littledale, contra.*

Garrow, Park and *Richardson,* for the new trial.

LORD ELLENBOROUGH, C. J. The court have not the least

doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is, whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; and the goods were afterwards ordered by Larrazabal & Co., credit given to them, and the invoices made out in their name and sent to them. The question is, whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases that an unknown principal, when discovered, is liable on the contracts which his agent made for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal & Co. as their debtors, or I should not have non-suited the plaintiffs; but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it considered.

BAYLEY, J. There may be a particular course of dealing with respect to trade in favor of a foreign principal, that he shall not be liable in cases where a home principal would be liable; that would be a question for the jury. I have generally understood that the seller may look to the principal where he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so.

GROSE, J. and LE BLANC, J., to the same effect.

New trial granted.

NOTE.—See following cases.

(4 TAUNTON, 573, 2 SMITH'S LEAD. CAS. 346.)

ADDISON vs. GANDASEQUI.

(English Court of Common Pleas, Trinity Term, 1812.)

This case, which is usually cited with the preceding was substantially like it, except that defendant was more active in agreeing upon prices and credit. Lord MANSFIELD, C. J., left it to the jury to say whether plaintiff sold the goods to Larrazable & Co. or to defendant; whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was the case of a factor buying goods for his principal; and the jury found for the defendant. A motion for a new trial was denied, Lord MANSFIELD, C. J., who delivered the opinion saying: "We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that Larrazable only was not to be the debtor, but that the defendant also, * * was to be liable; but we can find no evidence to warrant us in that conclusion."

NOTE.—See following cases.

(9 BARNWALL AND CRESWELL, 78, 2 SMITH'S LEAD. CAS. 351.)

THOMPSON vs. DAVENPORT.

(English Court of King's Bench, Hilary Term, 1829.)

Thompson, who lived in Dumfries, Scotland, directed his Liverpool agent, McCune, to buy certain goods for him. McCune bought them of Davenport & Co., informing the latter that he was buying the goods for a principal but not stating who the principal was. Davenport & Co. charged the goods to McCune, who was then in good credit, and the latter charged them to Thompson who did not know of whom McCune bought them. Before the time for payment arrived McCune became insolvent, and this action was brought to charge Thompson as his principal. The court below (the recorder) instructed the jury that if plaintiffs knew, at the time of the sale, that defendant was the principal, the verdict

should be for defendant, but if they did not then know who the principal was, so as to have the opportunity to elect between the principal and the agent, then they should find for the plaintiffs. Verdict for the plaintiffs, and defendant alleged error.

Joy, for plaintiffs in error.

Patteson, contra.

LORD TENTERDEN, C. J. I am of opinion that the direction given by the learned recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may, in the meantime, have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal.[1] On the other hand, if at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison vs. Gandasequi*, 4 Taunt. 574, *(ante*, p. 547) and *Paterson vs. Gandasequi*, 15 East. 62 *(ante*, p. 545), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that McKune, who came to them to buy the goods, was dealing for another; that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time, the means of making their election. It is true, that they might, perhaps, have obtained those means if they had made further inquiry, but they made no further inquiry. Not knowing who the principal really was, they had not the power, at that instant, of making their election. That being so, it seems to me that this middle case falls, in substance and effect, within the first proposition which I have mentioned, the case of a person not known

[1] This statement of the rule has since been disapproved. See *Irvine vs. Watson*, *post*, p. 550.

to be an agent; and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known. * * *

BAYLEY, J. * * * Where a purchase is made by an agent, the agent does not, of necessity, so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal many not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent and the principal would make it unjust that the seller should call on the principal,[1] the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits the agents, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered.

In the present case the seller knew that there was a principal, but there is no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of accounts between the principal and agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the insolvent agent, or to the estate of the insolvent agent, who has made no payment in respect to these

[1] See as to this, *Irvine vs. Watson*, *post*, p. 550.

goods? The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence it appears that the defendant had the goods, and has not paid for them, either to McKune or the present plaintiffs or to anybody else. He will be liable to pay for them, either to the plaintiffs or to McKune's estate. The justice of the case, as it seems to me, is that he should pay the plaintiffs, who were the sellers, and not any other persons. I am therefore of opinion that the direction of the recorder was right.

LITTLEDALE, J., to the same effect. Judgment affirmed.

NOTE.—While the result of this case has been approved, much that appears in the opinions of Lord TENTERDEN and BAYLEY, J., has been disapproved. See *Irvine vs. Watson*, *post*, p. 550.

As to what constitutes an election to look to the agent only, see *Beymer vs. Bonsall*, *post*, p. 554.

The principal case was quoted from and followed in *Merrill vs. Kenyon*, (1880) 48 Conn. 314, 40 Am. Rep. 174, where it was held that if one sells goods to another, who informs him that he is buying as agent for a third, but does not disclose his principal's name, and the seller does not require the name nor know who the principal is, but takes the agent's note for the price, he may still elect to hold the principal.

(LAW REPORTS, 5 QUEEN'S BENCH DIVISION 414, 29 MOAK'S ENG. REP. 371.)

IRVINE vs. WATSON.

(English Court of Appeal, June, 1880.)

Action to recover of defendants the price of oil bought for them from plaintiffs by defendants' broker. Plaintiffs had judgment below. Defendants appealed. Opinion states the facts.

Gully, Q. C., and *Compton*, for defendants.

W. R. Kennedy (*Sir Farrer Herschell, S. G.*, with him), for plaintiffs.

BRAMWELL, L. J. I am of opinion that the judgment must be affirmed. The facts of the case are shortly these: The plaintiffs sold certain casks of oil, and on the face of the contract of sale Conning appeared as the purchaser. But the plaintiffs knew that

he was only an agent buying for principals, for he told them so at the time of the sale, therefore they knew that they had a right against somebody besides Conning. On the other hand, the defendants knew that somebody or other had a remedy against them, for they had authorized Conning, who was an ordinary broker, to pledge their credit, and the invoice specified the goods to have been bought "per John Conning." Then, that being so, the defendants paid the broker, and the question is whether such payment discharged them from their liability to the plaintiffs. I think it is impossible to say that it discharged them, unless they were misled by some conduct of the plaintiffs into the belief that the broker had already settled with the plaintiffs, and made such payment in consequence of such belief. But it is contended that the plaintiffs here did mislead the defendants into such belief, by parting with the possession of the oil to Conning without getting the money. The terms of the contract were "cash on or before delivery," and it is said that the defendants had a right to suppose that the sellers would not deliver unless they received payment of the price at the time of delivery. I do not think, however, that that is a correct view of the case. The plaintiffs had a perfect right to part with the oil to the broker without insisting strictly upon their right to prepayment, and there is, in my opinion, nothing in the facts of the case to justify the defendants in believing that they would so insist. No doubt if there was an invariable custom in the trade to insist on prepayment where the terms of the contract entitled the seller to it, that might alter the matter; and in such case non-insistence on prepayment might discharge the buyer if he paid the broker on the faith of the seller already having been paid. But that is not the case here; the evidence before BOWEN, J., shows that there is no invariable custom to that effect.

Apart from all authorities, then, I am of opinion that the defendants' contention is wrong, and upon looking at the authorities I do not think that any of them are in direct conflict with that opinion. It is true that in *Thompson vs. Davenport*, 9 B. & C. 78 (*ante*, p. 547) both Lord TENTERDEN and BAYLEY, J., suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal.

But it is impossible to construe the dicta of those learned judges

in that case literally; it would operate most unjustly to the vendor if we did. I think the judges who uttered them did not intend a strictly literal interpretation to be put on their words. But whether they did or not, the opinion of PARKE, B., in *Heald vs. Kenworthy*, 10 Ex. 739, 24 L. J. (Ex.) 76, seems to me preferable; it is this, that, "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." That is in my judgment a much more accurate statement of the law. But then the defendants rely on the case of *Armstrong vs. Stokes*, L. R. 7 Q. B. 598. Now that is a very remarkable case; it seems to have turned in some measure upon the peculiar character filled by Messrs. Ryder as commission merchants. The court seemed to have thought it would be unreasonable to hold that Messrs. Ryder had not authority to receive the money. I think upon the facts of that case that the agents would have been entitled to maintain an action for the money against the defendant, for as commission merchants they were not mere agents of the buyer. Moreover the present is a case, which BLACKBURN, J., there expressly declines to decide. He expressly draws a distinction between a case in which, as in *Armstrong vs. Stokes, supra*, the seller at the time of the sale supposes the agent to be himself a principal, and gives credit to him alone, and one in which, as here, he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is.

It is to my mind certainly difficult to understand that distinction, or to see how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say whether he knew that the vendor had a claim against him and would look to him for payment in the agent's default. But it is sufficient here that the defendants did know that the sellers had a claim against them, unless the broker had already paid for the goods.

In this view of the case it is unnecessary to consider the further question raised by Mr. Kennedy, as to whether a payment on a

general running account, as distinguished from a payment specifically appropriated to the particular purchase, would be sufficient to bring the case within Lord TENTERDEN'S qualification of the general rule.

BAGGALLAY and BRETT, L. JJ., delivered concurring opinions.

Appeal dismissed.

NOTE—In the United States, the courts have, as a rule, followed the *dicta* of the English case of *Thompson vs. Davenport*, now repudiated in England as shown in the principal case. See *Fradley vs. Hyland*, (1888) 37 Fed. Rep. 49, 2 L. R. A. 749; *Laing vs. Butler*, 37 Hun, (N. Y.) 144; *Thomas vs. Atkinson*, 88 Ind. 248; *Clealand vs. Walker*, 11 Ala. 1058; *McCullough vs. Thompson*, 45 N. Y. Super. 449. See the cases reviewed in 23 Am. L. Rev. 565. In *Fradley vs. Hyland*, the principal case was apparently overlooked.

(116 NEW YORK, 625.)

KAYTON vs. BARNETT.

(New York Court of Appeals, December, 1889.)

Plaintiffs sold goods to one Bishop for $4,500. He paid $3,000 on delivery and gave three notes for the balance. He died insolvent not having paid any of the notes. Afterward, plaintiffs tendered these notes to defendants and sued them to recover the $1,500 on the ground that Bishop was really acting as agent for defendants in making the purchase. Defendants denied the agency. Judgment for defendants below.

W. J. Curtis, for appellants.

A. R. Dyett, for respondents.

FOLLETT, C. J. When goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase price. The defendants concede the existence of this general rule, but assert that it is not applicable to this case, because, while Bishop and the plaintiffs were negotiating, they stated they would not sell the property to the defendants, and Bishop assured them that he was buying for himself and not for them.

It appears by evidence, which is wholly uncontradicted, that the defendants directed every step taken by Bishop in his negotiations

with the plaintiffs; that the property was purchased for and delivered to the defendants, who have ever since retained it; that they paid the $3,000 towards the purchase price, and agreed with Bishop, after the notes had been delivered, to hold him harmless from them. Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously.

The judgment should be reversed and a new trial ordered.

Judgment reversed.

(79 PENNSYLVANIA STATE, 298.)

BEYMER vs. BONSALL.

(Supreme Court of Pennsylvania, October, 1875.)

This was an action of assumpsit commenced June 2, 1871, by Sterling Bonsall against Simon Beymer.

The plaintiff declared that on the 17th of November, 1870, in consideration of $1,000, paid by the plaintiff to Isaac Wagner and Richard Leech, brokers and agents of the defendant, he promised to deliver to the plaintiff, at or near Pittsburg, 5,000 barrels of petroleum, at any time from January 1 to June 30, 1871, upon ten days' notice to Wagner & Leech from the plaintiff, at 10½ cents per gallon on delivery; that the plaintiff, on the 12th day of June, 1871, ordered Wagner & Leech to deliver 5,000 barrels of petroleum, but Wagner & Leech refused to do so.

The defendant pleaded:

1. That the plaintiff at September term, 1871, of the court of

common pleas of Allegheny county, impleaded Wagner & Leech on the same cause of action as that upon which the present suit was founded, and did thereby elect to acquit and discharge the defendant of the same.

2. That in the same cause he recovered judgment against Wagner & Leech for $5,651.25, on the same promises and undertakings.

The plaintiff demurred to the plea, and assigned as cause of demurrer:

1. That it did not appear that because of a judgment recovered as was averred in the plea, the plaintiff has not also a cause of action against the defendant.

2. That the plaintiff did not acquit the principal by a recovery of a judgment against the agent.

The court did not decide upon the demurrer, but permitted the case to go to the jury.

The court instructed the jury to find for the plaintiff, the facts being undisputed, subject to the opinion of the court on the question, whether under the demurrer to the defendant's pleas the judgment should be for the defendant.

The jury found a verdict for the plaintiff for $6,300.

The court afterwards entered judgment for the plaintiff on the reserved question.

The defendant took a writ of error and assigned for error the entering judgment for the plaintiff.

G. Shiras, Jr., for plaintiff in error.

When the party dealing with an agent, and with knowledge of the agency, elects to make the agent his debtor he cannot afterwards have recourse to the principal. J. Kent's Com. 633; *Paterson vs. Gandassequi*, 15 East. 62; *Addison vs. Gandassequi*, 4 Taunton, 574; *Thompson vs. Davenport*, 9 B. & C. 78.

Where a creditor proceeds against a factor and obtains an award of arbitration against him, it is an election to treat the factor as his debtor, and he cannot enforce the claim against the principal. Though not actual, it is legal satisfaction for the debt. *Merrick's Estate*, 5 W. & S. 17; *Emery vs. Fowler*, 39 Maine, 226; *Campbell vs. Phelps*, 1 Pick. 62; *King vs. McLean*, 15 N. H. 9.

T. J. Keenan (with whom was *D. W. Sellers*) for defendant in error.

PER CURIAM. Undoubtedly an agent who makes a contract in his own name without disclosing his agency is liable to the other

party. The latter acts upon his credit and is not bound to yield up his rights to hold the former personally, merely because he discloses a principal who is also liable. The principal is liable because the contract was for his benefit, and the agent is benefited by his being presumedly the creditor, for there can be but one satisfaction. But it does not follow that the agent can afterwards discharge himself by putting the creditor to his election. Being already liable by his contract, he can be discharged only by satisfaction of it, by himself or another. So the principal has no right to compel the creditor to elect his action, or to discharge either himself or his agent, but can defend his agent only by making satisfaction for him. We think no error was committed by the court below, except in the form of the reservation. Judgment should have been given directly on the demurrer itself and not by way of reserved point upon it. This, however, is not a substantial error, and the judgment may be treated as entered upon the demurrer.

Judgment affirmed.

NOTE.—Taking the agent's note is not an election to look to him only, *Merrill vs. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Pope vs. Meadow etc. Co.*, 20 Fed. Rep. 35; *Keller vs. Singleton*, 69 Ga. 703; nor is the fact that the goods were charged to the agent; *Raymond vs. Crown, etc. Mills*, 2 Metc. (Mass.) 319; *French vs. Price*, 24 Pick. (Mass.) 13; *Guest vs. Opera House Co.*, 74 Iowa, 457; or sent the bill to the agent; *Henderson vs. Mayhew*, 2 Gill (Md.) 393, 41 Am. Dec. 434; or filed a claim against his estate, *Curtis vs. Williamson*, L. R. 10 Q. B. 57; or began action against him, *Cobb vs. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51.

Compare with *Cleveland vs, Pearl, post*, 556; *Kayton vs. Barnett, ante*. 553.

(63 VERMONT, 127, 25 AM. ST. REP. 748,)

CLEVELAND vs. PEARL.

(Supreme Court of Vermont, October, 1890.)

Pearl entered into a contract with Cleveland, on June 16, 1888, to buy Cleveland's wool. It was to be delivered to Pearl's agent, Hoyt, to whom Pearl was to supply the money to pay for it, which he did, before the wool was delivered, telling Hoyt to pay for it in cash. June 22, Cleveland delivered the wool to Hoyt, but the

latter instead of paying in cash, paid partly in cash and gave his own check for the balance which was dishonored. Cleveland kept the check until June 26, when he indorsed and delivered it to a third person in payment of a debt. June 26, Pearl settled with Hoyt paying him a balance greater than the amount of the check. July 9, Pearl learned for the first time that the wool had not been paid for in cash. This action was to hold Pearl liable for the amount unpaid. Judgment for plaintiff below and defendant appealed.

L. H. Thompson, for the appellants.

C. A. Prouty, for the plaintiff.

ROWELL, J. It not having been found how it was in fact, this was in law a sale for cash on delivery. And it is manifest that the parties so understood it, for the defendants put Hoyt in funds wherewith to pay on delivery, and the plaintiff called for payment in money when he delivered. And when he found that he could not get cash in full according to his right, he had an option not to deliver at all. But he chose to deliver notwithstanding, and to take Hoyt's check, payable to himself, for the unpaid balance, in the giving of which Hoyt was not defendant's agent, for he was acting outside the scope of his authority, which was to pay cash down, and the plaintiff ought to have known it. But if he did not, the law will treat him just as though he did, for he who deals with an agent having only a special and limited authority, is bound, at his peril, to know the extent of his authority. *White vs. Langdon,* 30 Vt. 599; *Sprague vs. Train,* 34 Vt. 150.

By taking the check in the circumstances disclosed,—agreeing for his own convenience for delay in presenting it, and subsequently parting with it in payment of his debt, the defendants having been prejudiced, if liable here, by paying their debt to Hoyt in the meantime, when, had they known how it was, they could have paid the plaintiff and saved themselves,—the plaintiff must be deemed to have made the check his own, and to have accepted the credit and responsibility of Hoyt instead of that of the defendants, and to have discharged the latter. In other words, Hoyt's check paid the debt as between these parties.

The plaintiff stands no better than he would had he taken the check in preference to the money, or had given a receipt acknowledging payment, when he would certainly have discharged the defendants; for so are all the authorities.

The case is not like those in which the plaintiff had no option, and could do better than to take a bill or note, and no injury resulted to the defendant in consequence of taking it. In such case the check is a conditional and not an absolute payment. *Robinson vs. Read,* 9 Barn. & C. 449, is of that class.

But here was no antecedent debt, and the plaintiff had the staff in his own hands, and might have kept the wool; but he chose to deliver it, and to take Hoyt's check for it, without authority from the defendants, or notice to them, and he has no standing to claim that the check was only conditional payment.

Judgment reversed and cause remanded.

II.

DISCLOSED PRINCIPALS.

(134 MASSACHUSETTS, 169, 45 AM. REP. 314.)

BYINGTON vs. SIMPSON.

(Supreme Judicial Court of Massachusetts, January, 1883.)

Suit on contract. The opinion states the case. The plaintiffs had judgment below.

J. H. Benton, Jr., for defendant.

S. L. Powers and *G. W. Sanderson,* for plaintiffs.

HOLMES, J. This is a suit to recover a balance due under a building contract. The contract was in writing and purported on its face to be made by the plaintiffs with J. B. Simpson. It provided that the work should be done under the direction of J. B. Simpson, agent, and was signed "J. B. Simpson, agent." J. B. Simpson was in fact contracting as agent for the defendant, his wife, and this was known to the plaintiffs at the time the contract was made.

The defendant contends that she was not bound by this contract under the foregoing circumstances. The fact that the contract purports to be under seal, although not sealed, has not been relied on as affecting the case, which especially in view of the inartificial nature of the instrument, it ought not to do; but the argument is

that inasmuch as the plaintiffs knew of the existence of a principal before the contract was made, and then were contented to accept a written agreement which on its face bound the agent, they must be taken to have dealt with, and to have given credit to, the agent alone; just as upon a subsequent discovery of the undisclosed principal, they might have determined their right to charge him by a sufficient election to rely upon the credit of the agent.

We are of opinion that plaintiffs' knowledge does not make their case any weaker than it would have been without it. Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signor, we cannot reopen it, for it is as well settled as any part of the law of agency. *Huntington vs. Knox*, 7 Cush. (Mass.) 371, 374 (*post*, p. 587); *Eastern Railroad vs. Benedict*, 5 Gray, (Mass.) 561, 66 Am. Dec. 384; *Lerned vs. Johns*, 9 Allen, 419; *Hunter vs. Giddings*, 97 Mass. 41; *Exchange Bank vs. Rice*, 107 Id. 37, 41, 9 Am. Rep. 1; *National Ins. Co. vs. Allen*, 116 Mass. 398; *Higgins vs. Senior*, 8 M. & W. 834 (*ante*, p. 456). And it is evident that words which are sufficient on their face, by established law, to bind a principal, if one exists, cannot be deprived of their force by the circumstance that the other party relied upon their sufficiency for that purpose. Yet that is what the defendant's argument comes to. For the same parol evidence that shows the plaintiffs' knowledge of the agency may warrant the inference that the plaintiffs meant to have the benefit of it and to bind the principal.

The only reasons which have been offered for the admissibility of oral evidence to charge the alleged principal confirm this conclusion. That suggested in *Higgins vs. Senior, ubi supra*, is the same which is usually given for the liability of a master for his servant's torts, that the act of the agent is the act of the principal (see 1 Bl. Com. 432; *Laugher vs. Pointer*, 5 B. & C. 547, 553; *Williams vs. Jones*, 3 H. & C. 602, 609); the meaning of which, in its latter application at least, is, as was stated long ago, that master and servant are "feigned to be all one person." West's Symboleography, part I, sec. 3, "Of the Fact of Man." The most plausible explanation which has been attempted pursues the same thought more clearly. It is said that the principal is liable "because he is taken to have adopted the name of the (agent) as his own for the purpose of (the) contract." 2 Smith Lead. Cas. 8th

ed. 408, note to *Thompson vs. Davenport; Trueman vs. Loder*, 11 Ad. & El. 589, 595; s. c., 3 P. & Dav. 267, 271. If this is to be accepted, there is obviously the strongest ground for saying that the principal has adopted the agent's name for the purposes of a given contract when it is shown that both parties have acted on that footing.

The most that could fairly be argued in any case would be, that under some circumstances, proof that the other party knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact, and as a matter of fact it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her.

The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction.

Our decision is in accordance with a thoroughly discussed English case which went to the exchequer chamber, and with the statement of the law by Mr. Justice STORY there cited. *Calder vs. Dobell*, L. R. 6 C. P. 486. Story, Agency, sec. 160*a*.

Judgment for the plaintiffs affirmed.

(111 NEW YORK, 604, 7 AM. ST. REP. 769.)

CONSTANT vs. UNIVERSITY OF ROCHESTER.

(New York Court of Appeals, January, 1889.)

Action to foreclose a mortgage made by Elizabeth Mehan and husband. The defendant, the University of Rochester, claimed title to the mortgaged premises, under the foreclosure of a second mortgage made to it by the same mortgagors, and alleged that it had no notice of plaintiff's mortgage. Judgment at special term for plaintiff was affirmed at the general term.

Martin W. Cooke, for the appellant.

John E. Parsons, for the respondents.

PECKHAM, J. In taking the mortgage of January, 1884, we think the university occupied the position of a mortgagee for a valuable consideration. It surrendered a prior mortgage, with the accrued interest thereon, and took the mortgage in question. If the university be not chargeable with notice of the prior mortgage to Constant, which was unrecorded, then its own mortgage is the prior lien as between the two. The first important question arising is, did Deane, who acted in the transaction as the attorney and agent for the university at the time of the execution of the mortgage to the university, have knowledge of the existence of the prior mortgage to Constant, executed in February, 1883, and which he then took as agent for Constant? In other words, is there any proof that, he, in January, 1884, had that fact present in his mind and recollection, so that it can be said from the evidence that he then had knowledge of its existence as an unpaid, outstanding obligation?

The transaction out of which the mortgage to the university arose occurred eleven months subsequent to the transaction out of which the mortgage in suit arose; and the former mortgage was neither a part of the same transaction as the latter, nor had it the least connection therewith. Under the law as decided by the older cases in England, such fact would have been an absolute defense to the claim that there was any constructive notice to the defendant arising out of notice to its agent, because such notice was in another and entirely separate transaction. In *Warrick vs. Warrick*, 3 Atk. 291, 294, decided by the Lord Chancellor HARDWICKE in 1745, that able judge assumed it as unquestioned law that notice to the agent, in order to bind his principal by constructive notice, should be in the same transaction. He said, "This rule, ought to be adhered to; otherwise it would make purchasers' and mortgagees' title depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." Cases were continually arising subsequent to that case, wherein the principle was assumed as the law of England, although the cases did not in their facts absolutely call for a decision on that point.

But in *Mountford vs. Scott*, 1 Turn. & R. 274, upon an appeal from a decision of the vice-chancellor, Lord Chancellor ELDON

said that the vice-chancellor proceeded upon the notion that notice to a man in one transaction is not to be taken as notice to him in another transaction. The lord chancellor continued: "In that view of the case, it might fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it." He further said that he would be unwilling to go so far as to say that if an attorney has notice of a transaction in the morning, he shall be held, in a court of equity, to have forgotten it in the evening; that it must in all cases depend upon the circumstances.

In *Hargreaves vs. Rothwell*, 1 Keen, 154, Lord LANGDALE, master of the rolls, held that where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, there is no ground for a distinction by which the rule that notice to the solicitor is notice to the client should be restricted to the same transaction.

In *Nixon vs. Hamilton*, 2 Dru. & Walsh, 364, decided in 1838, Lord Chancellor PLUNKET adverted to the rule as to the necessity of notice in the same transaction, and stated, if it were notice acquired in the same transaction, necessarily the principal was to be charged with the knowledge of the agent; but if it were notice received by him in another transaction, then such notice was not to affect the principal, unless he actually had the knowledge at the time of the second transaction. See, also, the case of *Dresser vs. Norwood*, 17 Com. B., N. S. 446, decided in the court of exchequer chamber.

This modification of the old English rule is recognized in the comparatively late case of *The Distilled Spirits*, 11 Wall. 356. Mr. Justice BRADLEY, in delivering the opinion of the Supreme Court of the United States, stated that the doctrine in England seemed to be established that, if the agent at the time of effecting a purchase has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend upon facts and other circumstances. Clear and satisfactory proof that it was so present seems to be the only restriction

required by the English rule as now understood. And the learned justice states that the rule, as finally settled by the English court, is, in his judgment, the true one, and is deduced from the best considerations of the reasons on which it is founded. In this opinion the whole court concurred.

Story, in his work on agency, section 140, says: "But unless notice of the fact come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal. For otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking of the agency. Notice, therefore, to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

In *Bank of the United States vs. Davis*, 2 Hill, (N. Y.) 451, it was held that the principal is deemed to have notice of whatever is communicated to his agent while acting as such in a transaction to which the communication relates. And it was held in that case that notice to a bank director or knowledge obtained by him while not engaged officially in the business of the bank would be inoperative as notice to the bank.

In *Holden vs. New York and Erie Bank*, 72 N. Y. 286, the rule was explained, and it was therein held that where an agency was in its nature continuous and made up of a long series of transactions of the same general character, the knowledge acquired by the agent in one or more of the transactions is to be charged as the knowledge of the principal, and will affect the principal in any other transaction in which the agent as such is engaged, and in which the knowledge is material. In that case it will be seen upon reading the very able opinion of FOLGER, C. J., that there was no question as to the knowledge of the agent of the various facts, and the only question raised was whether it should be imputed to his various principals in the transactions.

In *Cragie vs. Hadley*, 99 N. Y. 131, the doctrine that the knowledge of the agent should come to him in the identical transaction was alluded to, and it was held that it was not necessary in all cases that the notice should be thus given, and that notice to an agent of a bank intrusted with the management of its business was notice to the corporation in transactions conducted by such agent, acting for the corporation in the scope of his authority, whether the knowledge of the agent was acquired in the course of a particular

dealing or on some prior occasion. See, also, *Welsh vs. German American Bank*, 73 N. Y. 434; *Atlantic State Bank, etc., vs. Savery*, 82 Id. 291.

From all these various cases it will seem that the farthest that has been gone in the way of holding a principal chargeable with the knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, at another time and for another principal, was present to his mind at the very time of the transaction in question.

Upon a careful review of the testimony in this case, we have been unable to find any such proof. It is true, the learned trial judge finds, that, contemporaneously with the execution of the mortgage to the university, Deane caused to be made a statement, upon the basis that the amount was to be loaned to the mortgagors, and that, out of the money coming to them as a consideration for the mortgage to the university, the amount of the bond and mortgage to the plaintiff's decedent, with interest, was to be paid, and that mortgage was to be satisfied. And he further found that the university, through Deane, had notice of the mortgage of the plaintiff's decedent in connection with and as a part of any proposed transaction by which there was to be loaned to the mortgagor the amount of the bond and mortgage to the university. What is meant by the word "contemporaneously," as used in this finding, is, perhaps, not absolutely clear. If it meant that the statement mentioned was procured to be made by Deane as a part of and coincident with the execution of the mortgage to the university, it is not, as we think, based upon any evidence. There is no proof whatever in this case that Deane procured this statement to be made by any body, and Deane himself says that a statement of this nature would, by the course of practice in his office, have come to him (made by some one in his office) the day after the loan was closed. He does not pretend to recollect this particular statement, nor is there any evidence that he procured it to be made.

His testimony shows that he had no special recollection of the things which took place upon the occasion of the execution of the bond and mortgage to the university further than appeared by his books and other memoranda then made by others; and he does not pretend to say that this particular statement was presented to him,

or that he had the least knowledge of its existence, or of the facts therein stated, until the day after the closing of the transaction, and the execution of the mortgage to the university.

This is every particle of evidence that there is upon which a finding could be based, such as the learned judge made of knowledge or notice on the part of Deane of the existence of the Constant mortgage at the time of the transaction with the university, and the execution of the mortgage to it. The other facts in the case uncontradicted are that, for some years prior to January, 1884, Deane and the plaintiffs' decedent were acting together, and that the plaintiffs' decedent was, weekly and even almost daily, in the habit of investing large amounts of money upon mortgages of this nature, and that the dealings of plaintiffs' decedent in these various building mortgages, through Deane's office, had amounted, at the time of the mortgage to the university, in the aggregate, to three millions of dollars, if not more; that the mortgages were of all sizes, from six up to forty thousand dollars. It also appears that this very mortgage in suit was found after the execution of the university mortgage in a pigeon-hole in which satisfied mortgages were kept, and was found by the assignee of Deane after the assignment was made.

There was no proof in the case showing that Deane made any pretense of remembering, at the time of the execution of the mortgage to the university, that eleven months before he had taken a mortgage on the same property for the plaintiffs' decedent which was not recorded. Taking into consideration the enormous amount of business done by Deane for Constant of this same general nature, and the length of time that elapsed since the taking of the Constant mortgage by him, and the fact that it was never taken from the office of the mortgagee, and that it remained there and was found in a pigeon-hole appropriated to satisfied mortgages, and that on the very statement in question upon which the learned judge evidently based his finding it is alluded to as satisfied, all these facts would tend to show very strongly that Deane had no recollection whatever of the existence of the Constant mortgage as an existing lien at the time he took the mortgage to the university.

But the burden is upon the plaintiff to prove, clearly and beyond question, that he did, and it is not upon the defendant to show that he did not, have such recollection. And we think that there is a total lack of evidence in the case which would sustain the finding that Deane had the least recollection on the subject at the

time of the execution of the university mortgage. Under such circumstances, we think it impossible to impute notice to the university, or knowledge in regard to a fact which is not proved to have been possessed by its agent. If such knowledge did not exist in Deane at the time of his taking the mortgage to the university, then the latter is a *bona fide* mortgagee for value, and its mortgage should be regarded as a prior lien to that of the unrecorded mortgage of Constant, which is prior in point of date. The plaintiffs are bound to show by clear and satisfactory evidence that when this mortgage to the university was taken by Deane, he then had knowledge, and the fact was then present to his mind, not only that he had taken a mortgage to Constant eleven months prior thereto on the same premises, which had not been recorded, but that such mortgage was an existing and valid lien upon the premises, which had not been in any manner satisfied. If he recollected that there had been such a mortgage, but honestly believed that it was or had been satisfied, then, although mistaken upon that point, the university could not be charged with knowledge of the existence of such mortgage.

Quite a strong reason for not imputing knowledge to the agent, in this case, unless upon evidence clear and satisfactory, is, that if he had such knowledge, and thus knowingly took an utterly worthless security for his principal, he acted in the most improper and dishonest manner, and wilfully caused a loss to his principal of substantially the whole amount of the money represented by the mortgage which he took as a second lien. While this consideration is not controlling, if the evidence justified the assumption, it is yet of considerable weight, and adds to the propriety of the rule requiring clear proof of such knowledge at the very time of taking the mortgage to the university.

One other question has been argued before us which has been the subject of a good deal of thought. It is this: Assuming that Deane had knowledge of the existence of the Constant mortgage at the time of the execution of the mortgage to the university, is his knowledge to be imputed to the university, considering the position Deane occupied to both mortgagees?

While acting as the agent of Constant in taking the mortgage in question as security for the funds which he was investing for him, it was the duty of Deane to see that the moneys were safely and securely invested. The value of the property was between eleven thousand and twelve thousand dollars; and it was obviously the

duty of Deane to see to it that the mortgage which he took upon such property as a security for a loan of six thousand dollars for Constant should be a first lien thereon. *Whitney vs. Martine*, 88 N. Y. 535. In order to become such first lien, it was the duty of Deane to see to it that the Constant mortgage was first recorded. In January, 1884, when acting as agent for the university to invest its moneys, he owed the same duty to the university that he did to Constant, and it was his business to see to it that the security which he took was a safe and secure one. Neither mortgage was safe or secure if it were a subsequent lien to the other upon this property. This duty he continued to owe to Constant at the time he took the mortgage to the university.

At the time of the execution of the latter mortgage, therefore, he owed conflicting duties to Constant, and to the university the duty in each case being to make the mortgage to each principal a first lien on the property. Owing these conflicting duties to two different principals, in two separate transactions, can it be properly said that any knowledge coming to him in the course of either transaction should be imputed to his principal? Can any agent occupying such a position bind either principal by constructive notice? It has been stated that in such a case, where an agent thus owes conflicting duties, the security which is taken or the act which is performed by the agent may be repudiated by his principal when he becomes aware of the position occupied by such agent. Story on Agency, sec. 210.

The reason for this rule is, that the principal has the right to the best efforts of his agent in the transaction of the business connected with his agency; and where the agent owes conflicting duties, he cannot give that which the principal has a right to demand, and which he has impliedly contracted to give. Ought the university to be charged with notice of the existence of this prior mortgage when it was the duty of its agent to procure for it a first lien, while, at the same time, in his capacity as agent for Constant, it was equally his duty to give to him the prior lien? Which principal should he serve? There have been cases where, in the sale and purchase of the same real estate, both parties have employed the same agent, and it has been held, under such circumstances, that the knowledge of the agent was to be imputed to both of his principals.

If, with a full knowledge of the facts that his own agent was the agent of another, each principal retained him in his employment,

we can see that there would be propriety in so holding; for each then, notes the position which the agent has with regard to the other, and each takes the risk of having imputed to him whatever knowledge the agent may have on the subject. See *Le Neve vs. Le Neve*, 1 Amb. 436, HARDWICKE, chancellor, decided in 1747; *Toulmin vs. Steere*, 3 Mer. 209, decided in 1817, by Sir Walter GRANT, master of the rolls. The case of *Nixon vs. Hamilton*, already referred to, decided by Lord PLUNKET, lord chancellor in the Irish court of chancery, in 1838 (2 Dru. & Walsh, 364), is a case in many respects somewhat like the one at bar, so far as this principle is concerned, if it be assumed that Deane really had the knowledge of the prior mortgage as an existing lien. It will be observed, however, upon examination of it, that the question whether the knowledge of the common agent in two different transactions, with two different principals, was notice to the second principal, was not raised with reference to this particular ground.

The whole discussion was upon the subject of imputing the knowledge of the agent to the second mortgagee, of the existence of the prior mortgage, which knowledge was not obtained in the last transaction. Whether such knowledge should or should not be imputed to the second mortgagee, because of the conflicting duties owed by the common agent, was not raised. The only defense set up was, that the information did not come to the agent of the second mortgagee, in the course of transacting the business of the second mortgagee, and the question was simply whether such knowledge could be imputed to the second mortgagee because of the knowledge acquired by his agent at another time, in another transaction, with another principal. The court held that where it appeared, as in this case it did appear, fully and plainly that the matter was fresh in the recollection, and fully within the knowledge of the agent, and under such circumstances that it was a gross fraud on the part of the agent, in the first place in keeping a prior mortgage off the record, and in the second place, in not communicating the knowledge which he had to his principal, the second mortgagee, that in such case the second mortgagee was charged with the knowledge of his agent.

Whether the same result would have been reached if the other ground had been argued, we cannot, of course, assume to decide. I have found no case precisely in point where the subject has been discussed and decided either way. I have very grave doubts as to the propriety of holding in the case of an agent, situated as I have

stated, that his principal in the second mortgage should be charged with the knowledge which such agent acquired in another transaction at a different time while in the employment of a different principal, and where his duties to such principal still existed and conflicted with his duty to his second principal. We do not deem it, however, necessary to decide the question in this case.

For the reasons already given, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

NOTE.—See following case.

(139 MASSACHUSETTS, 332, 52 AM. REP. 710.)

INNERARITY vs. MERCHANTS' NATIONAL BANK.

(Supreme Judicial Court of Massachusetts, May, 1885.)

Plaintiffs shipped a cargo to one Burgess for sale on their account. The bill of lading consigned the goods to the order of Burgess. Burgess fraudulently pledged the bill of lading to defendant bank to secure a loan to himself. Burgess was one of the directors of the bank and met with them at the time they approved this loan.

E. D. Sohier and *F. L. Hayes*, for plaintiff.

S. Bartlett, and *L. S. Dabney*, for defendant.

DEVENS, J. (After stating the facts.) This transfer by Burgess & Sons of the sugar was a fraud upon the plaintiffs; but it is not contended that it in any way failed to convey a full title in pledge to the defendant bank, unless under the circumstances the bank is to be charged with the knowledge of Burgess. The plaintiffs requested the presiding judge to rule that if Burgess was present as a director when said loan was acted upon by the board of directors, his knowledge of the plaintiffs' title to the sugar, and that the firm of Burgess & Sons had no right to pledge it, was the knowledge of the defendant bank. This ruling was refused by the presiding judge, who found for the defendant.

While the knowledge of an agent is ordinarily to be imputed to the principal it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as

raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Kennedy vs. Green,* 3 Myl. & K. 699; *Cave vs. Cave,* 15 Ch. D. 639; *In re European Bank,* L. R. 5 Ch. 358; *In re Marseilles Extension Railway,* L. R. 7 Ch. 161; *Atlantic National Bank vs. Harris,* 118 Mass. 147; *Loring vs. Brodie,* 134 Mass. 453.

One of the most recent cases on this point is *Dillaway vs. Butler,* 135 Mass. 479. A, to whom B was indebted, advised C to lend money to B on the security of a mortgage of personal property, and acted as C's agent in completing the transaction. With the money thus obtained, B paid A the debt he owed him. Both A and B acted in fraud of the General Statutes, chap. 118, secs. 89, 91; but C. had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C, although A had acted for C in the negotiation.

But the question in the case at bar is not so much what are the responsibilities of a principal for an agent, as whether Burgess can be considered in any proper sense as an agent for the defendant bank in the transaction of the loan, even if directors are ordinarily to be treated as such. The plaintiffs seek to impute to the corporation knowledge of a fraud, because in a contract made avowedly not for it, but for himself, and necessarily acting adversely to its interests, a director was aware that he was committing a fraud. This in effect is to say that there can be no transaction between a bank and one of its directors in which, so far as the transfer of property is concerned, the bank can be protected, if there is fraud on the part of the director, and that the bank can never discount paper on which one of its directors is a party, and retain the position of an innocent indorsee for value under the law merchant.

A bank or other corporation can act only through agents, and it is generally true, that if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge. *National Security Bank vs. Cushman,* 121 Mass. 490. But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that here presents the interests of the bank. To hold otherwise might sanction

gross frauds, by imputing to the bank a knowledge those properly representing it could not have possessed. Whether Burgess acted or not at the meeting of the directors in the matter of the loan, he could not lawfully have done so as the representative of the bank. His individual interest was distinctly antagonistic; and the question before the board related to its approval of a provisional transaction between himself and the president of the bank, in which he was the proposed borrower and the bank was to be the lender.

A director offering a note of which he is the owner for discount, or proposing for a loan of money on collateral security alleged to be his own property, stands as a stranger to it. That a joint stock bank, says, in substance, Sir W. M. JAMES, should have imputed to it the knowledge which the director has of his own private affairs, is a most unreasonable proposition. *In re Marseilles Extension Railway*, L. R. 7 Ch. 170. The relation which a director, who is himself acting for another in a negotiation with a bank, occupies toward it was considered in *Washington Bank vs. Lewis*, 22 Pick, 24, where it was argued, that although he was not the agent of the bank yet his knowledge of facts showing the note to be invalid was that of the bank, "Whatever a director or other agent of a bank," say the court, "may do within the scope of his authority would bind the bank so as to make them responsible to the person dealt with. But in the present case Thompson was the party applying for the discount, and was not acting as director nor could he with any propriety so act. He was the party with whom the bank contracted in discounting the note, and to whom the money was paid."

The proposition that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority. *Stratton vs. Allen*, 1 C. E. Green, 229; *Barnes vs. Trenton Gas Light Co.*, 12 C. E. Green, 33; *Hightstown Bank vs. Christopher*, 40 N. J. L. 435; *Winchester vs. Baltimore & Susquehanna Railroad*, 4 Md. 231; *Wickersham vs. Chicago Zinc Co.*, 18 Kans. 41, 26 Am. Rep. 784; *Seneca County Bank vs. Neass*, 5 Denio, 329, 337; *Third National Bank vs. Harrison*, 10 Fed. Rep. 243; *Stevenson vs. Bay City*, 26 Mich. 44; *In re Marseilles Extension Railway, ubi supra; In re European Bank, ubi supra.* In some of these cases weight appears to be given to the fact that the director was not actually present at the meeting when the transaction was concluded, but this cannot be of importance. If it were shown that Burgess urged the loan upon

the board of directors, and actually voted in favor of it, his associates not seeing fit to intervene or object to this conduct, he would still have acted on his own behalf, and of those whose interests and efforts were of necessity adverse to those of the corporation. To assume that under such circumstances the facts he knew were communicated to the directors, and that he had laid before them the fraud he was committing in wrongfully pledging property, would be a presumption too violent for belief, and would do great injustice to the remaining directors and the interests they represented.

While the current of authority is in favor of the conclusion we have reached, two cases are much relied on by the plaintiffs which were not overlooked in the opinions delivered in several of the cases cited above, and which have not there commanded approval. These are *United States Bank vs. Davis*, 2 Hill, 451, and *Union Bank vs. Campbell*, 4 Humph. 394. In each of these cases it was held that the knowledge of a director of what was held to invalidate a contract was to be imputed to the bank. In neither of these cases was the director whose knowledge was imputed to the bank the adverse contracting party, which would perhaps distinguish them sufficiently from the case at bar. But in each of them the director acted for the person contracting with the bank, and thus secured to himself important advantage; and we are not prepared to assent to the proposition that a director thus acting is competent to affect with his knowledge of fraud the bank whose director he is. His interests and conduct are adverse to it, and his position forbids that he should be treated as its representative.

Exceptions overruled.

(119 UNITED STATES, 99.)

VICKSBURG & MERIDIAN RAILROAD vs. O'BRIEN.

(Supreme Court of the United States, November, 1886.)

Action to recover damages for personal injury. Verdict for plaintiff.

Hoadly, Johnson & Colston, and *Wm. Nugent*, for plaintiff in error.

Thos. C. Catchings, for defendant in error.

HARLAN, J. (After disposing of a preliminary question.) At the trial below, plaintiffs introduced one Roach as a witness, who, during his examination, was asked whether he did not, shortly after the accident, have a conversation with the engineer having charge of defendant's train at the time of the accident, about the rate of speed at which the train was moving at the time. To that question the defendant objected, but its objection was overruled, and the witness permitted to answer. The witness had previously stated that, on examination of the track after the accident, he found a cross-tie or cross-ties under the broken rail in a decayed condition. His answer to the above question was: "Between ten and thirty minutes after the accident occurred, I had such a conversation with Morgan Herbert, the engineer having charge of the locomotive attached to the train at the time of the accident, and he told me that the train was moving at the rate of eighteen miles an hour."

The defendant renewed its objection to this testimony by a motion to exclude it from the jury. This motion was denied, and the exception taken. As bearing upon the point here raised, it may be stated that, under the evidence, it became material—apart from the issue as to the condition of the track—to inquire whether, at the time of the accident (which occurred at a place on the line where the rails in the track were, according to some of the proof, materially defective), the train was being run at a speed exceeding fifteen miles an hour. In this view, the declaration of the engineer may have had a decisive influence upon the result of the trial.

There can be no dispute as to the general rules governing the admissibility of the declarations of an agent to affect the principal. The acts of an agent, within the scope of the authority delegated to him, are deemed the acts of the principal. Whatever he does in the lawful exercise of that authority is imputable to the principal, and may be proven without calling the agent as a witness. So, in consequence of the relation between him and the principal, his statement or declaration is, under some circumstances, regarded as of the nature of original evidence, "being," says Phillips, "the ultimate fact to be proved, and not an admission of some other fact." 1 Phil. Ev. 381.

"But it must be remembered," says Greenleaf, "that the admission of the agent cannot always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration

of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, *et dum fervet opus.* It is because it is a verbal act and part of the *res gestæ* that it is admissible at all; and, therefore, it is not necessary to call the agent to prove it; but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act *while he was doing it.*" 1 Greenleaf, § 113. This court had occasion in *Packet Co. vs. Clough,* 20 Wall. 540, to consider this question. Referring to the rule as stated by Mr. Justice STORY in his treatise on Agency, § 134, that, "Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestæ,*" the court, speaking by Mr. Justice STORY, said: "A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. The reason is, that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ.*"

We are of opinion that the declaration of the engineer Herbert, to the witness Roach, was not competent against the defendant for the purpose of proving the rate of speed at which the train was moving at the time of the accident. It is true that, in view of the engineer's experience and position, his statements under oath, as a witness, in respect to that matter, if credited, would have influence with the jury. Although the speed of the train was in some degree, subject to his control, still his authority in that respect did not carry with it authority to make declarations or admissions at a subsequent time, as to the manner in which, on any particular trip, or at any designated point in his route, he had performed his duty. His declaration, after the accident had become a complete fact, and when he was not performing the duties of engineer, that the train, at the moment the plaintiff was injured, was being run at the rate of eighteen miles an hour, was not explanatory of anything in which he was then engaged. It did not accompany the act from which the injuries in question arose. It was, in its essence, the mere narration of a past occurrence, not a part of the *res gestæ,* simply an assertion or representation, in the

course of conversation, as to a matter not then pending, and in respect to which his authority as engineer had fully been exerted. It is not to be deemed part of the *res gestæ*, simply because of the brief period intervening between the accident and the making of the declaration.

The fact remains that the occurrence had ended when the declaration in question was made, and the engineer was not in the act of doing anything that could possibly affect it. If his declaration had been made the next day after the accident, it would scarcely be claimed that it was admissible evidence against the company. And yet the circumstance that it was made between ten and thirty minutes—an appreciable period of time—after the accident, cannot, upon principle, make this case an exception to the general rule. If the contrary view shall be maintained, it would follow that the declarations of the engineer, if favorable to the company, would have been admissible in its behalf as part of the *res gestæ*, without calling him as a witness—a proposition that will find no support in the law of evidence. The cases have gone far enough in the admission of the subsequent declarations of agents as evidence against their principals.

These views are fully sustained by adjudications in the highest courts of the states. *Luby vs. Hudson River Railroad*, 17 N. Y. 131; *Pennsylvania Railroad vs. Brooks*, 57 Penn. St. 339, 343; 98 Am. Dec. 229; *Dietrick vs. Baltimore, etc., Railroad*, 58 Md. 347, 355; *Lane vs. Bryant*, 9 Gray, 245, s. c., 69 Am. Dec. 282; *Chicago, Burlington, etc. Railroad vs. Riddle*, 60 Ill. 534; *Virginia & Tennessee Railroad vs. Sayers*, 26 Gratt. 328, 351; *Chi. & N. W. Railroad vs. Fillmore*, 57 Ill. 265; *Mich. Central Railroad vs. Coleman*, 28 Mich. 440, 446; *Mobile & Montgomery Railroad vs. Ashcraft*, 48 Ala. 15, 30; *Bellefontaine Railway vs. Hunter*, 33 Ind. 335, 354, 5 Am. Rep. 201; *Adams vs. Hannibal & S. J. Railroad*, 74 Mo. 553, 556, 41 Am. Rep. 333; *Kan. & Pacific Railroad vs. Pointer*, 9 Kan. 620, 630; *Roberts vs. Burks*, Litt. (Ky.) Select Cas. 411, s. c., 12 Am. Dec. 325; *Hawker vs. Baltimore & Ohio Railroad*, 15 West Va. 628, 636, 36 Am. Rep. 825. See, also, 1 Taylor, Ev., 7th Eng. ed., § 602.

We deem it unnecessary to notice other exceptions taken to the action of the court below.

This case was decided at the last term of this court, and Mr. Justice WOODS concurred in the order of reversal upon the grounds herein stated.

For the errors indicated the judgment is reversed and the cause remanded for a new trial, and for further proceedings consistent with this opinion.

FIELD, MILLER, and BLATCHFORD, J. J., and WAITE, C. J., dissented, saying: The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.

NOTE.—In *People vs. Vernon*, 35 Cal. 49, 95 Am. Dec. 50, it is said: "Declarations to be a part of the *res gestæ* are not required to be precisely concurrent in point of time with the principal fact; if they spring out of the principal transaction, if they tend to explain it, are voluntary and spontaneous, and are made at a time so near it as to preclude the idea of deliberate design, then they are to be regarded as contemporaneous and are admissible." To same effect is *Keyser vs. Chicago & G. T. Ry. Co.*, 66 Mich. 390, citing many other cases.

II.

LIABILITY OF PRINCIPAL IN TORT.

(106 NEW YORK, 195, 60 AM. REP. 440.)

BANK OF BATAVIA vs. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

(New York Court of Appeal, June, 1887.)

Action of damages for wrongful issue of bill of lading. The opinion states the facts. The plaintiff had judgment below.

E. C. Sprague, for appellant.

H. E. Sickels, for respondent.

FINCH, J. It is a settled doctrine in the law of agency in this state that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant

to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. *North River Bank vs. Aymar*, 3 Hill, 262; *Griswold vs. Haven*, 25 N. Y. 595, 601, 82 Am. Dec. 380; *N. Y. & N. H. R. Co. vs. Schuyler*, 34 N. Y. 30; *Armour vs. M. C. R. Co.* 65 N. Y. 11, 22 Am. Rep. 603.

A discussion of this doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction, it arises in the case of municipal corporations, whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiffs, and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor, specifying the terms of shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the bank may be dismissed with the observation that no privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. *N. Y. & N. H. R. Co. vs. Schuyler, supra.*

While bills of lading are not negotiable in the sense applicable

to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable;" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. *Mayenborg vs. Haynes,* 50 N. Y. 675; *Maguire vs. Seldon,* 103 N. Y. 642.

Those were cases in which the representations made were not intended and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious also upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business

founded upon transfers of bills of lading. Of whom shall the lender inquire and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go to the freighthouse or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recitals in the bill that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made, the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it therefore within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NOTE.—Compare with following case.

(130 UNITED STATES, 416.)

FRIEDLANDER vs. TEXAS AND PACIFIC RAILWAY COMPANY.

(Supreme Court of the United States, April, 1889.)

Action by Friedlander & Co. against the railway company to recover for the non-delivery of certain cotton named in an alleged bill of lading issued by an agent of defendant, one E. D. Easton,

and of which plaintiffs were the assignees. The opinion states the facts. Judgment for defendant in the court below.

A. G. Safford, for plaintiffs in error.

Winslow F. Pierce and *John F. Dillon,* for defendant in error.

Mr. Chief Justice FULLER delivered the opinion of the court.

The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also, "that except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading," cannot be held to operate as a limitation. The inference to be drawn from this statement is that no cotton whatever was delivered for transportation to the agent at Sherman station.

The question arises then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of the fraud, the pretended shipper negotiates a draft, with the false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen,

though to a *bona fide* purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his right as against a purchaser, who had been misled to his hurt by reason of such negligence. *Shaw vs. Railroad Co.* 101 U. S. 557, 563; *Pollard vs. Vinton,* 105 U. S. 7, 8; *Gurney vs. Behrend,* 3 El. & Bl. 622, 633, 634. It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its posession for transportation, because one of its agents having authority to sign bills of lading, by collusion with another person, issues the document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman vs. Buckingham,* 18 How. 182, 191; *The Lady Franklin,* 8 Wall. 325; *Pollard vs. Vinton,* 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow vs. Mason,* 2 T. R. 77; *Grant vs. Norway,* 10 C. B. 665; *Cox vs. Bruce,* 18 Q. B. D. 147. "The receipt of the goods," said Mr. Justice MILLER, in *Pollard vs. Vinton, supra,* "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

"And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice MATTHEWS in *Iron Mountain Railway vs. Knight,* 122 U. S. 79, 87, he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman vs. Buckingham,* 18 How. 182, and *Pollard vs. Vinton,* 105 U. S. 7."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co.

The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business.

The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said WILLES, J., in *Barwick vs. English Joint Stock Bank*, L. R. 2 Ex. 259, 265, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." See, also, *Limpus vs. London General Omnibus Co.*, 1 H. & C. 526. The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mutual Banking Co. vs. Charnwood Forest Railway Co.*, 18 Q. B. D. 714.

The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading, may work injury to an innocent party, which cannot be redressed by a change of victim.

Under the Texas statutes the trip or voyage commences from the

time of the signing of the bill of lading issued upon the delivery of the goods, and thereunder the carrier cannot avoid his liability as such, even though the goods are not actually on their passage at the time of a loss, but these provisions do not affect the result here.

We cannot distinguish the case in hand from those heretofore decided by this court, and in consonance with the conclusions therein announced this judgment must be affirmed.

NOTE.—Following *Bank of Batavia vs. Railroad Co.* are *Brooke vs. Railroad Co.*, 108 Penn. 529; *Sioux City R. R. Co. vs. First National Bank*, 10 Neb. 556; *Savings Bank vs. Railroad Co.*, 20 Kans. 519.

Following the *Friedlander* case, see, also, *National Bank of Commerce vs. Chicago, B. & Q. R. Co.*, 44 Minn. 224.

CHAPTER VI.

DUTIES AND LIABILITIES OF THIRD PERSONS TO THE AGENT.

(106 MASSACHUSETTS 334, 8 AM. REP. 332.)

RHOADES vs. BLACKISTON.

(Supreme Judicial Court of Massachusetts, January, 1871.)

Action by plaintiff upon a contract made by him in his own name while he was acting as agent for Alonzo V. Lynde. Plaintiff had since been declared a bankrupt.

T. H. Sweetser and *C. Abbott,* for plaintiff.

W. A. Field, for defendant.

COLT, J. It is a well-established rule of law that when a contract not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it. If the agent sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. There is an additional reason for giving this right to this agent, when he has a special interest in the subject-matter, or a lien upon it. But the rule prevails when the sole interest under the contract is in the principal. The agent's right is, of course, subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired. *Colburn vs. Phillips,* 13 Gray, 64; *Fairfield vs. Adams,* 16 Pick. 383; Story on Agency, § 403.

In this case, the contract relied on was made by the plaintiff in his own name, as agent for an undisclosed principal, who does not now in any way interpose. But, admitting the law of principal and agent as that stated, the defendants further contend that the plaintiff's right of action passed to his assignees in bankruptcy, who were appointed in proceedings commenced after the alleged breach. It appears that the plaintiff made the contract in the

course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that, after the debt was paid, the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until the debt should be paid. And it is claimed that, upon these facts, the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as a legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignee, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If, however, the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time. *Webster v. Scales,* 4 Doug. 7; *Winch v. Keeley,* 1 T. R. 619; *Carpenter v. Marnell,* 3 B. and P. 40. In most of the English cases in which these rules have been applied, there was an assignment of a chose of action by the bankrupt to a third party, made before the bankruptcy, and they have mainly turned on the question, whether the transfer was absolute or only as security for debt, and, if as security only, then further, on the question whether the security was of greater value than the debt secured, at the time of the bankruptcy.

The case of *D'Arnay vs. Chesneau,* 13 Mees. & Welsb., 796–809, relied on at the argument, was of this description, and Baron PARKE there declared: "That if the debt to be secured was less than the debt assigned, and there was nothing more than a simple assignment of the debt as a security, the right of action would vest in the insolvent's assignees. In such a case they would have an immediate interest in the sum to be recovered, from which benefit to the creditors might result, and they would not have been bound to refund all they had recovered to the equitable assignee of the debt (their *cestui que trust*), which is the proper criterion." *Dangerfield vs. Thomas,* 9 Ad. & El. 292.

The court are of opinion that the rule in these cases, if ever

applicable to a case where an agent sues upon a contract, made in the course of his agency, where the suit is subject to the control of the principal, cannot be applied to defeat the plaintiff's action here. The pledged property consisted of a business to be carried on with the capital of the party to whom it was transferred.

The contracts made in the course of it were the contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. *Parnham vs. Hurst,* 8 Mees. & Welsb. 743; *Ontario Band vs. Mumford,* 2 Barb. Ch. 596; 3 Parsons on Contract, 479.

Case to stand for trial.

NOTE.—See *Rowe vs. Rand, ante,* p. 257.

CHAPTER VII.

DUTIES AND LIABILITIES OF THIRD PERSONS TO PRINCIPAL.

(7 CUSHING, 371.)

HUNTINGTON vs. KNOX.

(Supreme Judicial Court of Massachusetts, September. 1851.)

The opinion states the facts.

M. Wilcox, for plaintiff.

I. Sumner, for defendant.

SHAW, C. J. This action is brought to recover the value of a quantity of hemlock bark, alleged to have been sold by the plaintiff to the defendant, at certain prices charged. The declaration was for goods sold and delivered, with the usual money counts. The case was submitted to a referee by a common rule of court, who made an award in favor of the plaintiff, subject to the opinion of the court on questions reserved, stating the facts in his report, on which the decision of those questions depends.

The facts tended to show that the bark was the property of the plaintiff; that the contract for the sale of it was made by her agent, George H. Huntington, by her authority; that it was made in writing by the agent, in his own name, not stating his agency, or naming or referring to the plaintiff, or otherwise intimating in the written contract, that any other person than the agent was interested in the bark. Objection was made before the referee, to the admission of parol evidence, and to the right of the plaintiff to maintain the action in her own name. The referee decided both points in favor of the plaintiff, holding that the action could be maintained by the principal and owner of the property, subject to any set-off, or other equitable defense, which the buyer might have, if the action were brought by the agent. The court are of opinion, that this decision was correct upon both points. Indeed they resolve themselves substantially into one; for *prima facie*, and looking only at the paper itself, the property is sold by the agent, on

credit; and in the absence of all other proof, a promise of payment to the seller would be implied by law; and if that presumption of fact can be controverted, so as to raise a promise to the principal by implication, it must be by evidence *aliunde*, proving the agency and property in the principal.

It is now well settled by authorities, that when the property of one is sold by another, as agent, if the principal give notice to the purchaser, before payment, to pay to himself, and not to the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent.

When a contract is made by deed under seal, on technical grounds, no one but a party to the deed is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be made in the name of the principal, in order that he may be a party, because otherwise he is not bound by it.

But a different rule, and a far more liberal doctrine, prevails in regard to a written contract not under seal. In the case of *Higgins vs. Senior*, 8 Mees. & Wels. 834, (*ante*, p. 456) it is laid down as a general proposition, that it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract of sale, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this whether the agreement be or be not required to be in writing, by the statute of frauds.

But the court mark the distinction broadly between such a case and a case where an agent, who has contracted in his own name, for the benefit, and by the authority of a principal, seeks to discharge himself from liability, on the ground that he contracted in the capacity of an agent. The doctrine proceeds on the ground that the principal and agent may each be bound; the agent, because by his contract and promise he has expressly bound himself; and the principal, because it was a contract made by his authority for his account. *Paterson vs. Gandasequi*, 15 East, 62 (*ante*, p. 545); *Magee vs. Atkinson*, 2 Mees. & Wels. 440; *Trueman vs. Loder*, 11 Ad. & Ell. 589; *Taintor vs. Prendergast*, 3 Hill, (N. Y.) 72, 38 Am. Dec. 618; *Edwards vs. Golding*, 20 Vt. 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract; yet as the contract is shown in fact to be made for his benefit, and by his authority, he is liable.

So, on the other hand, where the contract is made for the benefit

of one not named, though in writing, the latter may sue on the contract jointly with others, or alone, according to the interest. *Garrett vs. Handley*, 4 B. & C. 664; *Sadler vs. Leigh*, 4 Campb. 195; *Coppin vs. Walker*, 7 Taunt. 237; Story on Agency, § 410. The rights and liabilities of a principal, upon a written instrument executed by his agent, do not depend upon the fact of the agency appearing on the instrument itself, but upon the facts: (1) that the act is done in the exercise, and (2) within the limits, of the powers delegated; and these are necessarily inquirable into by evidence. *Mechanics' Bank vs. Bank of Columbia*, 5 Wheat. (U. S.) 326.

And we think this doctrine is not controverted by the authority of any of the cases cited in the defendant's argument. *Hastings vs. Lovering*, 2 Pick. (Mass.) 214, was a case where the suit was brought against an agent, on a contract of warranty upon a sale made in his own name. The case of the *United States vs. Parmele*, Paine 252, was decided on the ground that in an action on a written executory promise, none but the promisee can sue. The court admit that, on a sale of goods made by a factor, the principal may sue. This action is not brought on any written promise made by the defendant; the receipt is a written acknowledgment, given by the plaintiff to the defendant, of part payment for the bark, and it expresses the terms upon which the sale had been made. The defendant, by accepting it, admits the sale and its terms; but the law raises the promise of payment. And this is by implication, prima facie, a promise to the agent; yet it is only prima facie and may be controlled by parol evidence that the contract of sale was for the sale of property belonging to the plaintiff, and sold by her authority to the defendant by the agency of the person with whom the defendant contracted.

Judgment for plaintiff.

NOTE.—See *Briggs vs. Partridge*, *ante*, p. 436.

(57 PENNSYLVANIA STATE, 202, 98 AM. DEC. 215.)

FARMERS' AND MECHANICS' NATIONAL BANK vs. KING.

(Supreme Court of Pennsylvania, February, 1868.)

Scire Facias against the Farmers' and Mechanics' National Bank, garnishees in a foreign attachment in which King was plaintiff and John H. Curtis, Jr., was defendant. The defendant was the plaintiff's agent for collecting rents, and in May, 1866, owed him between eleven hundred and twelve hundred dollars. Curtis was also agent for the Philadelphia Saving Fund Society, for the trustees of the Fotteral estate, and others. He deposited his clients' funds in the bank garnished. Curtis absconded about the 30th of April, 1866. On the 31st of May the attachment was served on the garnishees, and there was at that time a balance in the bank of $1,140.36 to the credit of Curtis. And five minutes after, a notice was served on the cashier of the garnishees, informing them that the moneys were in fact the moneys of the Philadelphia Saving Fund Society, and of Russell and Eisenbery, trustees, and could be specifically shown to be such, and warning them not to pay the funds to Curtis.

The substance of the testimony offered and rejected by the court is stated in the opinion. The court refused to affirm the defendant's points, and instructed the jury to find for the plaintiffs, which they did, and the garnishees took a writ of error, and assigned for error the rejection of their offer of evidence and the instruction of the court.

H. Wharton and *R. L. Ashhurst,* for the plaintiff in error.

G. D. Budd and *H. E. Wallace,* for the defendant in error.

By court, STRONG, J. There was evidence at the trial that the money which had been deposited in the bank by John H. Curtis was not his own, but that it belonged to his clients. He obtained it as their agent, and he held it as such. And had the additional evidence offered been received, it would have appeared that at least $835.81 of the amount belonged to the Philadelphia Saving Fund Society and to the trustees of the Fotteral estate. It had been collected for them, and deposited to the credit of their agent. Their right to it was not lost because it was thus deposited. It is

undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership.

It is conceded, for the cases abundantly show it, that when the bank received the deposits, it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability have been extinguished in the absence of interference by his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its re-payment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to their agent, his right to reclaim it had not ceased. A bank can be in no better situation than any other debtor. If an agent receive money of his principal, and lends it, taking a promissory note to himself, the note belongs to his principal, and the borrower may not pay the agent after he has been informed that there is a superior right, and has received notice not to pay the agent. This is a rule of general application. Story in his treatise on equity, in section 1259, remarks: "It matters not in the slightest degree into whatever other form different from the original the change may have been, whether it be that or promissory notes or of goods, or of stock, for the product or the substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such." Even at law an unknown principal often may avail himself of a contract made with his agent. In the case of a simple contract he may show that the apparent party was his agent, and treat the contract as made with himself, not, however, injuriously affecting the rights of the other party. In many of these cases he is allowed to sue directly upon the contract. But wherever he can show that his money has been placed in the hands of another by his agent, it is no objection to his claim that that other has promised to pay it to the agent. In *Frazier vs. Erie City Bank*, 8 Watts & S. 18, it was ruled that if an agent procure the note of his principal to be discounted, and deposit the proceeds in bank to his own credit, the principal may maintain an action therefor against the bank in his own name, and this though the bank had no notice when the deposit was made that the money deposited did not belong to the agent. There are several English

cases at law, some cited in the argument, and others referred to by READ, J., in *Bank of Northern Liberties vs. Jones*, 42 Pa. St. 536, that may be noticed; *Sims vs. Bond*, 5 Barn. & Adol. 389, is one. It was an action brought to recover the balance of an account with a banker, in the name of another, upon the allegation that it was the money of the plaintiffs, and it was held that plaintiffs who seek to recover the balance of such an account must show that the loans were made by them.

So in *Tassel vs. Cooper*, 9 Com. B. 509 where the bailiff of Lord DUDLEY had paid a check belonging to his employer into his own account with certain bankers, who received the cash for it, and gave credit for it in the bailiff's account, it was held that the bailiff could recover it, even after Lord DUDLEY had given notice to the bankers of the fraud, and indemnified them. These cases are hardly reconcilable with our own case of *Frazier vs. Erie City Bank, supra*. It is perhaps fair to surmise that they would have been differently decided did the English system of pleading allow parties to stand in a court of law either as plaintiffs or defendants on a mere equitable right. In *Pennell vs. Deffell*, 4 De G. M. & G. 572, we have the rule as understood in equity. It was a contest between an official assignee in bankruptcy and insolvency, and the executors of a prior deceased assignee, who had kept an account with bankers, into which he had paid his own money as well as the money of the trusts. The accounts were not distinguished as official accounts, but were opened in the depositor's own name. There was nothing to show that he was not alone interested in the sums due from time to time from the bankers.

Lords Justices KNIGHT, BRUCE and TURNER held that the assignee was entitled as against the executors of the depositor. The former said that "when a trustee pays money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically been placed by the trustee in a particular repository, and so remained." There is much more in the case. It is particularly to be noticed that the moneys of several distinct trusts were carried into the account; that the trustee's own money had been mixed with them, and that a rule was laid down for determining what belonged to the trusts and what to the depositor. It is true, *Pennell vs. Deffell, supra*,

does not determine the right to sue at law; but it determines the ownership of the fund under the circumstances described, and if that is established with us, there can be no difficulty as to the right of the owner to sue.

This was decided in *Stair vs. York National Bank*, 55 Pa. St. 364, 93 Am. Dec. 759, a case decided at last May term, in which the opinion was delivered by our brother AGNEW. There W. W. Wolf had deposited in the bank a sum of money belonging to Sherer's estate. It was credited in a pass-book in which other credits were given to him as sheriff, yet Sherer's administrator *de bonis non* was allowed to recover it from the bank. A deposit in bank, then, does not change the property in trust funds deposited by a trustee. The depositor may become a creditor of the bank, but he holds the contract in trust as he held the money before. It is not applicable to the payment of his debts to a general creditor. And a creditor who attaches the debt due from the bank to him can be in no better condition than the depositors. At most, he becomes a statutory assignee of a naked legal right, with the beneficial ownership in another.

It is strenuously insisted, however, that *Jackson vs. Bank of the United States*, 10 Pa. St. 61, asserts a different doctrine. But that case differs materially from the present, and it is not in conflict with anything we have hitherto said. There after a foreign attachment served, and even after a *scire facias* against the garnishees, the defendant had made deposits in the bank in his own name. He subsequently drew out all his deposits, the bank paying his checks without any regard to the attachment.

It was held that the bank could not afterwards defend against the *scire facias* by attempting to show that the money deposited in fact was the money of some undisclosed principal of the depositor. When the money was paid the bank had no knowledge that it belonged to any other. There was therefore no other cause for withholding it than the attachment itself. The case seems to have been put upon the ground that the bank could not have resisted the claim of the depositor. Said Judge Coulter: "They (the bank) received it (the money) and the bills as his, entered them on their books as his, and were bound, in the absence of any attachment, to have paid the funds to him. * * * The attaching creditor stands in the place of Warwick (depositor)." All this is true. But how would it have been if the real owners of

the funds, as in this case, had given notice to the bank of their claim to the money and demanded it? Could they not then have resisted the claim of the depositor? *Frazier vs. Erie City Bank,* and *Stair vs. York National Bank, supra,* show they could.

If at the time the deposits were made they had known the money was clothed with a trust, they could not have paid it to Warwick in disregard of the trust. *Bank of Northern Liberties vs. Jones,* 42 Pa. St. 536, decides that. Until warned to the contrary, they had a right to assume the depositor was authorized to draw the money, but when warned, it was not so. The judge said: "It is worthy of remark that the persons alleged by the garnishees to be the *cestuis que trust* never gave notice to the attaching creditor of any claim, never appeared in court to move that the attachment should be quashed, nor took any step asserting ownership or indicative of it." Another reason given for holding the garnishees liable to the attaching creditor was that they, after having paid the money to the depositor, and by their own books, papers, and records given the evidence that it was his, should not be permitted to allege the contrary for the purpose of protecting themselves in a wrongful act. "The duty of the garnishee," said the judge, "was, after having received the money and bills as the money and bills of Warwick, from himself, to have retained them until liberated by due course of law." All this is totally inapplicable to the present case.

The language of the judge must be considered with reference to the facts; and if so, *Jackson vs. Bank of the United States,* 10 Pa. St. 61, does not rule the present case. Here the money remains in bank undrawn, and while thus remaining, the true owners assert their claim to it. And had the rejected evidence been received, there would have been no difficulty in identifying that portion of it which belonged to the saving fund society and to the trustees of the Fotteral estate. Eight hundred and thirty-five dollars and eighty-one cents of the money in the bank was theirs. It was collected by Curtis and deposited since any check was drawn, and unless their right to it was lost by the deposit, it is still theirs. That the fact of depositing it did not destroy their ownership, is settled by the cases already cited, among which are *Bank of Northern Liberties vs. Jones* and *Stair vs. York National Bank, supra.* But it is insisted that there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-mark.

But that is only an index, enabling a beneficial owner to follow his property. It is no evidence of ownership. An ear-mark is not indispensable to enable a real owner to assert his right to property, or to its product or substitute.

Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. It is freely admitted that if a trustee or agent receive money of a *cestui que trust* or principal, and mingle it with his own so that it cannot be followed, the *cestui que trust* or principal cannot recover it specifically. This is not because the ownership is changed, but because a court cannot lay hold of the property as that of the owner. But in regard to money, substantial identity is not oneness of pieces of coin or of bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own and convert himself into a mere debtor to his principal. The principal may by the law claim out of the chest the sums which belonged to him before the admixture. *Tennell vs. Deffell, supra.*

Applying now what we have said to the present case, the evidence offered and rejected should have been received, and the jury should have been instructed that, if they believed it, $835.81 of the fund in the bank were not the property of John H. Curtis, and were not liable to attachment as such.

It is apparent, in this view of the case, that it is quite immaterial whether the attachment was served before the notice of the saving fund society and of the trustees of the Fotteral estate. The attaching creditor stands in the position of the depositor, and can recover only what the depositor could.

The judgment is reversed, and a *venire de novo* ordered.

NOTE.—See, also, *National Bank vs. Insurance Co.*, 104 U. S. 54; *Fifth National Bank vs. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218; *Riehl vs. Evansville Foundry Association*, 104 Ind. 70; *Wolffe vs. State*, 79 Ala. 201, 58 Am. Rep. 590.

(100 NEW YORK, 31, 53 AM. REP. 150.)

BAKER vs. NEW YORK NATIONAL BANK.

(New York Court of Appeals, October, 1885.)

Action upon a check. Wilson and Bro., commission merchants, were insolvent, and opened an account in defendant bank in their name, with the word "agents" added, in which account they deposited the proceeds of goods sold by them for their principals on commission. The purpose of this was to protect their principals, among whom were the plaintiffs, and of this purpose the bank had knowledge. The check in question was given by Wilson & Bro. in settlement of their account with plaintiffs. Defendant, as excuse for not paying the check, alleged that Wilson & Bro. had authorized defendant to charge to this account a claim due from Wilson & Bro. as individuals, and that this claim had exhausted the account so that there were no funds with which to pay the check. Plaintiffs had judgment below and defendant appealed.

Thos. Allison, for appellant.

E. More, for respondents.

ANDREWS, J. The relation between a commission agent for the sale of goods and his principal is fiduciary. The title to the goods until sold remains in the principal, and when sold, the proceeds, whether in the form of money or notes, or other securities, belong to him, subject to the lien of the commission agent for advances and other charges. The agent holds the goods and the proceeds upon an implied trust to dispose of the goods according to the directions of the principal, and to account for, and pay over to him the proceeds from sales. The relation between the parties in respect to the proceeds of sale is not that of debtor and creditor simply. The money and securities are specifically the property of the principal, and he may follow and reclaim them, so long as their identity is not lost, subject to the rights of a *bona fide* purchaser for value.

In case of the bankruptcy of the agent, neither the goods nor their proceeds would pass to assignees in bankruptcy for general administration, but would be subject to the paramount claim of the principal. *Chesterfield Manufacturing Co. vs. Dehon*, 5 Pick. 7., s. c. 16 Am. Dec. 367; *Merrill vs. Bank of Norfolk*, 19 Pick.

32; *Thompson vs. Perkins,* 3 Mason, 232; *Knatchbull vs. Hallet,* 13 Ch. Div. 696; *Duguid vs. Edwards,* 50 Barb. 290; Story on Agency, § 229. The relation between a principal and a consignee for sale is, however, subject to modification by express agreement, or by agreement implied from the course of business or dealing between them. The parties may so deal that the consignee becomes a mere debtor to the consignor for the proceeds of sale, having the right to appropriate the specific proceeds to his own use.

In the present case the bank account against which the check was drawn represented trust moneys belonging to the principals for whom Wilson & Bro. were agents. The deposits to the credit of this account were made in the name of the firm, with the word "agents" added. They were the proceeds of commission sales. Wilson & Bro. became insolvent in October, 1878, and they opened the account in this form for the purpose of protecting their principals, which purpose was known to the bank at the time. The check in question was drawn on this account in settlement for a balance due to plaintiffs, upon cash sales made by the drawers as their agents. It is clear upon the facts that the fund represented by the deposit account was a trust fund, and that the bank had no right to charge against it the individual debt of Wilson & Bro. The bank, having notice of the character of the fund, could not appropriate it to the debt of Wilson & Bro., even with their consent to the prejudice of the *cestuis que trust.*

The supposed difficulty in maintaining the action arising out of the fact that the money deposited was not the specific proceeds of the plaintiffs' goods is answered by the case of *Van Alen vs. American Nat'. Bank,* 52 N. Y. 1. Conceding that Wilson & Bro. used the specific proceeds for their own purposes, and their identity was lost, yet when they made up the amounts so used, and deposited them in the trust account, the amounts so deposited were impressed with the trust in favor of the principals, and become substituted for the original proceeds and subject to the same equities. The objection that the deposit account represented not only the proceeds of the plaintiffs' goods, but also the proceeds of the goods of other persons, and that the other parties interested are not before the court, and must be brought in in order to have a complete determination of the controversy, is not well taken.

The objection for defect of parties was not taken in the answer, and moreover, it does not appear that there are any unsettled

accounts of Wilson & Bro., with any other person or persons for whom they were agents. The check operated as a setting apart of so much of the deposit account to satisfy the plaintiff's claim. It does not appear that the plaintiffs are not equitably entitled to this amount out of the fund, or that there is any conflict of interest between them and any other person or persons for whom Wilson & Bro. acted as consignees. The presumption, in the absence of any contrary indication, is that the fund was adequate to protect all interests, and that Wilson & Bro. appropriated to the plaintiffs only their just share.

We are of the opinion that the judgment was properly directed, and it should therefore be affirmed.

All concur. Judgment affirmed.

(150 MASSACHUSETTS, 461.)

CITY OF BOSTON vs. SIMMONS AND WILSON.

(Supreme Judicial Court of Massachusetts, January, 1890.)

Action of tort. The opinion states the facts. The defendant Wilson demurred to the declaration.

S. J. Thomas, A. Russ and *D. A. Dorr,* for Wilson.

A. J. Bailey, for the plaintiff.

DEVENS, J. (After disposing of another question.) The declaration to which the defendants have demurred, and the allegations which we must take for the purpose of this hearing, to be true, omitting the expletives by which they have been characterized, are that Simmons was a member of the water board of the city of Boston, which board was empowered and authorized to purchase for the city, land for the purpose of constructing a reservoir; that he knew and had a share in determining the action of the board in making such purchase, and further, that Wilson had knowledge of the position, knowledge, and authority of Simmons; that together, taking advantage of this, and intending to defraud the plaintiff, it was agreed corruptly between them, that Simmons should inform Wilson of the doings of the board in the selection of the land, and of the piece which they should consider suitable for a site for said reservoir; and that they further agreed that Wilson should become

the purchaser of this lot, that it should afterwards be purchased by the board at an advanced price, and that the profits should be divided between themselves.

The declaration further avers that, in pursuance of this agreement, Simmons did impart to Wilson that the board had considered a particular lot suitable for a reservoir; that it was then bought by Wilson; that thereafter the board, influenced by Simmons, did purchase this land for the city at an advanced price from Wilson, and that Wilson and Simmons divided the profits of the transaction.

If this whole transaction, as described by the declaration, had been conducted by Simmons alone, without aid from or intervention of Wilson—if knowing the determination of the board that the lot in question was suitable for the purpose, he had himself purchased it, and then, availing himself of his influence with the board, had induced it to purchase the lot from him at an advanced price—he certainly would have been liable to the city for the injury occasioned by this abuse of his trust. He was one of the officials of the city, acting on its behalf, bound to act in good faith, to make a proper selection of the lot for a reservoir, and to purchase it at the most reasonable price. *Walker vs. Osgood,* 98 Mass. 348, 93 Am. Dec. 168; *Cutter vs. Demmon,* 111 Mass. 474; *Rice vs. Wood,* 113 Mass. 133, 135, 18 Am. Rep. 459, (*ante* p. 12).

To purchase himself the lot of land which he knew the board of which he was a member had considered suitable, with a view to compel it to pay an advanced price therefor, and thereafter to avail himself of his influence with the board to have this advanced price actually paid, and thus to obtain a profit, would be a violation of the duty he owed to the city and a wrong done to the city for which it should be entitled to a remedy. The fact that he acted according to the averments of the declaration in connection with another party, presumably that his relation to the purchase might not appear and his influence be thus destroyed, does not disminish his own responsibility; while the other, who participated in the scheme, and who has knowingly aided and abetted in the transaction, and shared its profits in pursuance of their agreement so to do, becomes a wrongdoer with him. *Adams vs. Paige,* 7 Pick. 542, 550; *Emery vs. Hapgood,* 7 Gray, 55, 58, 66 Am. Dec. 459; *United States vs. State Bank,* 96 U. S. 30, 35.

It is said on behalf of Wilson that nothing had been done towards the purchase of the lot when Simmons imparted to him the

information; that the allegation that the board had considered the lot in question as suitable for the reservoir, is not an allegation that anything was actually done towards its purchase; that Wilson might elsewhere have obtained information that the members of the board were talking of buying the lot; that this conversation gave them no right in it; that the owner could still properly sell to whom he pleased; and that Wilson had the same right to purchase that anyone has who buys an estate in anticipation of future uses which will make it more valuable.

While it is true that one may avail himself of his own judgment, or of information properly obtained, to purchase land in anticipations of its rise in value, it is quite a different question whether one who knows another to be acting for a principal who desires to purchase a piece of land may, on receiving information of this from the agent, purchase the land himself upon an arrangement with the agent that he will use his efforts to induce the principal to complete the purchase at an advanced price, and then divide the profits with him.

The abuse of trust of which the agent is guilty with his knowledge and co-operation is a wrong for which both are liable, as the injury to the principal is the result of their combined action. Where an agent purchased property for his principal, and falsely represented that he had paid for it a larger sum than he had actually paid, it was held that he would be liable for such overplus. There is no reason why one who has intentionally co-operated with him, and has enabled him to commit the fraud, should not be equally liable. *McMillan vs. Arthur*, 98 N. Y. 167. The owner or *cestui que trust* may pursue the trust funds into whosoever hands they may have passed, so long as they can be traced and knowledge of their character can be brought home to the possessor. Not less should the principal, who had been wronged by the misconduct of his own agent, be allowed to pursue, not merely him, but those who have actively co-operated in his breach of duty, and accepted their share of the profits of the transaction.

It is not important that the board, when, as it is alleged, Simmons informed Wilson that it had determined that the lot was a suitable one for the reservoir, does not appear to have then finally decided to take it, or that Simmons alone could not have compelled them to take it. He had no right to confide to another the result of the deliberations of the board so far as they had progressed. If he did so, and if, with full knowledge on the part of both, the two

entered into an agreement that Wilson should then purchase and hold the land for an advanced price, to be divided between them if the operation should prove successful, while Simmons should use his influence with the board, of which he was a member, to have it purchased at the advanced price, an agreement was made to commit a fraud upon the city. If the allegations made shall be proved, and if the fraud shall have been consummated by means of the information imparted by Simmons, the purchase made by Wilson, and the influence of Simmons with the board which were all parts of the same plan, the defendants are alike liable for the injury which the city has sustained.

Demurrer overruled.

Note.—See, also, *Miller vs. Louisville, etc., R. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722; *United States Rolling Stock Co. vs. Atlantic, etc., R. R. Co.*, 34 Ohio St. 450, 32 Am. Rep. 380; *Hegenmyer vs. Marks*, 37 Minn. 6, 5 Am. St. Rep. 808; note to *Potter's Appeal*, 7 Am. St. Rep. 280.

(Law Reports, 1891, 1 Q. B. Div. 168.)

MAYOR, ETC., OF SALFORD vs. LEVER.

(English Court of Appeal, November, 1890.)

Plaintiffs were the proprietors of the gas works in their borough and purchased large quantities of coal. One Hunter was manager of the gas works, and it was his duty to examine tenders for coal and report to the plaintiff. Defendant was a coal merchant and submitted tenders for coal. In order to induce Hunter to recommend the acceptance of his tenders, he secretly agreed to pay Hunter a commission of one shilling per ton. To this Hunter assented, and it was agreed between them that the tenders should be raised one shilling per ton, and that when defendant received his pay from plaintiffs he would pay Hunter his commission. Hunter advised the acceptance of defendant's tender, and defendant furnished coal until the amount of the commission amounted to £2,329, of which Hunter had received about £1,500.

Hunter made like agreements with other parties until the amount of overcharges (including the above) which plaintiffs had paid exceeded £10,000.

Plaintiffs brought actions against Hunter to recover the amount of these commissions or bribes, when, at Hunter's request, an agreement between himself and plaintiffs (not under seal) was entered into by which Hunter deposited £10,000 to secure plaintiffs against loss, the action against him was stayed and plaintiffs were to attempt to recover from the defendant and others who had secured the money, the amount recovered to apply to reduce Hunter's liability and when paid in full, he was to be discharged. This action was thereupon begun and a judgment was rendered for plaintiffs for £2329. Defendant appealed.

Lawson Walton, Q. C., for the defendants.

The learned judge misdirected the jury in not telling them that the release given by the person wronged to one of two joint tort-feasor's operates as a release of the other also, and that acceptance of satisfaction from the one amounts to a receipt of satisfaction from the other, and is an answer to an action against him by the person wronged; Co. Litt. 232*a*. *Brinsmead vs. Harrison,* Law Rep. 7 C. P. 547; *Bird vs. Randall,* 3 Burr. 1345; *Cocke vs. Jennor,* Hob. 66; *Buckland vs. Johnson,* 15 C. B. 145.

The corporation agreed to maintain their own cause of action against Lever and the other contractors, and to give Hunter the benefit of it, The proceeds of the litigation were to go to him. The effect of the agreement with Hunter was, to diminish the amount of damages which the corporation could recover from Lever.

Henn Collins, Q. C. and *C. Gould,* for the plaintiffs.

The plaintiffs were entitled to recover from Hunter, their agent, the bribes which he had received from Lever, and they had also a separate and independent right of action against Lever, or against him jointly with Hunter, to recover from Lever the excess of the price which they had paid to him above the price which he would have demanded, but for his agreement with Hunter to pay him the 1 s per ton.

A bribe received by an agent belongs *ipso facto* to his principal; an action by the principal for money had and received to his use will lie in respect of it. But the principal can also sue the briber Lever, for the 1 s per ton excess of price which they have paid him, and he cannot set off against their claims the bribe which he has paid Hunter. This right of the principal against the agent is independent of his affirming or disaffirming the contract with the third party.

Parker vs. McKenna, Law Rep. 10 Ch. 96, 118; *Emma Silver Mining Co. vs. Grant,* 11 Ch. D. 918, 937; *Bagnall vs. Carlton,* 6 Ch. D. 371. If the plaintiffs had brought their action against Lever before making any claim against Hunter, it would be no defense for Lever to say, "I bribed your agent." That would not amount to a plea of payment.

[Lord ESHER, M. R. If they received the money from Lever, could they go on and recover it again from Hunter?]

They could recover the same amount from him, but it would not be the same money. [LINDLEY, L. J., referred to *Lister & Co. vs. Stubbs,* 45 Ch. D. 1.]

It must be immaterial whether the principal sues his agent or the third party first, the fraud gives him a right to recover something more than mere damages. If the plaintiffs had sued Hunter first, their right to sue Lever would have remained unaffected. Then the question arises, How does the agreement with Hunter affect their rights? It is submitted that it does not affect them at all. The law as to the effect of a release of one of two joint tort-feasors has no application.

The rights of action arising out of the fraud are several and independent. If the fraud of the agent had damaged the principal to a greater extent than the amount of the bribe, the principal could sue him for damages, as well as for the amount of the bribe. If the agreement is *ultra vires,* it cannot be a defense to the action. But the plaintiffs do not desire to take either this objection or the objection that the agreement was not under seal. If the agreement is binding, it does not amount to either a release of Hunter or an accord and satisfaction; unless it amounts to one or other of these, it cannot be a defense to the action. A covenant not to sue one of two joint debtors does not operate as a release of the other. *Hutton vs. Eyre,* 6 Taunt. 289. *A fortiori,* a covenant not to sue one for a specified time, cannot so operate. In this agreement there is not any express covenant not to sue Hunter.

There is, at the most, an implied covenant not to sue him for a specified time. The assistance of Hunter was necessary to enable the plaintiffs to discover the fraudulent contractors, and the agreement amounts only to this, that if Hunter would, by depositing securities, guarantee that the plaintiffs should recover £10,000, they would for a specified time sue only the contractors. At the end of that time it would be open to them to sue him upon his guarantee. The contract is with one tort-feasor that the plaintiffs

will (if they can) recover the money from the other, and as consideration for this, he gives them security to the amount of £10,000. Such an agreement is no defense to an action against the other tort-feasor.

LAWSON WALTON, Q. C., in reply: Lever was not the servant of the plaintiffs. He was really paying Hunter a part of his own profits. The action against him is for damages, which would not be liquidated until the verdict of the jury. A plaintiff who claims damages is bound to prove that he has suffered some loss. If he has been reimbursed in any way he has suffered no loss. To the extent of what Hunter has paid them, the plaintiffs have been compensated for their loss, and cannot recover damages against Lever.

Cur. adv. vult.

Nov. 1. Lord ESHER, M. R. The corporation of Salford have brought this action against the defendant, who is a coal merchant, and it is an action founded on fraud. What is the fraud which the defendant had committed? He had coals to sell, and he was obliged to make a bargain with the corporation through their agent, a man who, no doubt, would be known in Salford as having the power to make contracts for the corporation, and who, consequently, would be looked to by traders. The defendant knew that this man was the agent of the corporation, and that his duty was to buy coals for them at the price at which the defendant or some other trader was willing to sell them.

The defendant was at liberty to sell the coals at any price he could get for them, not necessarily at the market price, but at the best price which he could obtain. He was bound, however, to act honestly. He offered this man Hunter to sell him coal at a price which would give him such a profit as he desired. But then Hunter tempted him by saying: "You want to sell your coals at a price which will give you a profit. I have the power of buying coals from you or from anybody else, and I will not buy them from you at the price at which you are willing to sell them, unless you will help me to cheat the corporation out of another shilling a ton. You are to have your price; but you are to add to it in the bills which you send to the corporation another shilling per ton, making the real price apparently a shilling per ton more; but that shilling is to be mine—you are to give it to me." They call this a commission, a term very well known, at all events in the north of England, and commissions sometimes cover a multi-

tude of sins. In the present case it was meant to cover a fraud.

The fraud was this, that the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals in order to cheat the corporation out of a shilling a ton which was to be paid to their own agent; and the way in which it was done was this: The defendant sent in a bill to the corporation for the whole price thus increased. He got the advanced price into his hands, and as he got it by fraud, he is bound to pay it back unless something has happened to oust the right of the corporation. The damage to the corporation is clearly the one shilling per ton, out of which they have been cheated, neither more nor less. The form of the action, on which some stress has been laid in the argument, is immaterial. Unless something has happened to oust the right of the corporation, they are entitled to sue the defendant for the 1 s. a ton in one form of action or another, although he has parted with the money, and has handed it over to his confederate Hunter, because it was once in his hands, and he is liable for the fraud to which he was thus a party.

But the defendant says that something has happened which prevents the corporation from enforcing this right, and the first ground which was taken was this: that this money which came into his hands passed into the hands of Hunter, the agent of the corporation, and they have recovered it, or part of it, from Hunter, and therefore cannot recover it from the defendant. This defense was advanced independently of, and without reference to, the agreement between the corporation and Hunter. On what ground have the corporation recovered the money from Hunter? Hunter, their agent, had received money from the defendant, for the performance of a duty which he was bound to perform without any such payment. Nothing in law could be more fraudulent, dangerous, or disgraceful, and therefore the law has struck at such conduct in this way.

It says that if an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has, by reason of the fraud, received beyond his due. It is a separate and distinct fraud of the agent. He might have received the money without any fraud of the person who was dealing with him. Suppose that person thought that the agent was entitled to a commission, he would not be fraudulent, but the agent would be, and it is because of his separate

and distinct fraud that the law says he must give up the money to his principal. It signifies not what it may be called—whether damages or money had and received—the foundation of the claim of the principal is, that there is a separate and distinct fraud by his agent upon him, and therefore he is entitled to recover from the agent the sum which he has received.

But does this prevent the principal from suing the third person also, if he has been fraudulent, because of his fraud? It has been settled that, if the principal brings an action against the third person first, he cannot set up the defence that the action cannot be maintained against him because the thing was done through the agent, and the principal was entitled to sue the agent. What difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds—the one in his character of agent, the other by reason of his conspiracy with the third person with whom he has been dealing. Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages by reason of the principal having recovered from the agent the bribe which he had received.

But then the defendant says—and this is his second ground—that, even if this be so, the corporation have entered into an agreement with their agent Hunter which prevents them from suing the defendant in respect to the combined fraud of Hunter and himself. There is a well settled rule that, if there are two joint tort-feasors, and the third person to whom the wrong has been done releases one of the two, he cannot afterward sue the other. That is a well known rule. Whether the rule goes further, and extends to an accord and satisfaction with one tort-feasor, it is immaterial now to consider. Let us see what has been done. It is said that the corporation have entered into an agreement with Hunter. Though the corporation will not take the objection that the agreement is not under seal, I am not sure that the court ought not to take it, seeing that the defendant has been guilty of a fraud.

There is in fact no agreement at all which is binding on the corporation, because the alleged agreement does not bear their seal. First, then, there is no agreement; and, secondly, even supposing there is an agreement such as the defendant alleges, namely,

that the corporation undertook to bring action in the first instance against the third parties, at his request and at his expense, to recover the extra price which they had received, that would not, as far as I can see, be a compromise of a doubtful claim. It was an absolute agreement entered into by the officers of the corporation, and, if it were binding on the corporation, they bound themselves to bring the actions at the request of Hunter, and thus lost their independence as to whether these actions should proceed or not. If the actions failed, the corporation would be primarily liable for the costs to the persons against whom they were brought. It was true they were to get the costs from Hunter; but they would be primarily liable. They had given up their independence, and had bound themselves to bring the actions whether they were likely to be successful or not. They had bound the ratepayers to pay the costs in the first instance, if the actions failed, and to take the chance of Hunter paying them, and, supposing Hunter's securities proved insufficient, the ratepayers would lose these costs. Under these circumstances, speaking for myself alone, I am of opinion that the agreement was wholly *ultra vires* the corporation. They had no mandate from the ratepayers to agree to it.

But, suppose that difficulty to be got over, what was the effect of the agreement? Was it a release of Hunter in respect to the combined fraud? Certainly it was not a release, it did not purport to be that; moreover, it was not under seal, and it cannot therefore be dealt with as a release. And, when the terms of the agreement are looked at, it was clearly not a release of Hunter. It is perfectly true, as Mr. Henn Collins has pointed out, that the agreement merely suspended the action of the corporation against Hunter, and left it open to them to sue him afterwards, should circumstances arise in which they might think it right to do so. It was, in fact, nothing more than a postponement of their right of action, and that of itself cannot prevent them from suing Lever. Therefore, upon almost every ground upon which the case can be looked at, there is no defense to this action, and the defendant is liable. I know the result of it all may be this—that the corporation will recover their money from the defendant, and from other traders in a similar position against whom they may proceed, and that Hunter will have the benefit of it.

Certainly the corporation cannot legally return to Hunter the money which they may thus recover. It belongs to the ratepayers, and the corporation have no possible right to pay it over to Hunter.

But the result will be the same. These coal dealers, who were tempted by Hunter and persuaded by him to pay to him the bribes, will be the sufferers. They may be ruined; and Hunter, when he comes out of prison, may find the securities, which are the result of his plunder and his gross frauds, untouched, and he may retain the whole of the money which he has received in this way. I am sorry for it, but such in my opinion, is the law. It follows, therefore, that the defendant has no defense, and the judgment of the Divisional Court must remain, and the appeal must be dismissed.

LINDLEY and LOPES, L. JJ., concurred in the dismissal.

NOTE.—Compare with *Atlee vs. Fink*, *ante*, p. 14; *Smith vs. Sorby*, 3 Q. B. Div. 552; *Harrington vs. Dock Co.*, Id. 453; *Panama Co. vs. India Rubber Co.*, L. R. 10 ch. ap. 515.

(55 VERMONT, 570, 45 AM. REP. 639.)

ST. JOHNSBURY AND LAKE CHAMPLAIN RAILROAD CO. vs. HUNT.

(Supreme Court of Vermont, October, 1882.)

Action by the railroad company to recover damages against defendant for maliciously causing the arrest of its engineer, Collins, while running his train, with intent to injure the company. Judgment for defendant below, upon demurrer to the declaration.

Belden & Ide, for plaintiff.

P. K. Gleed, for defendant.

VEAZEY, J. (After holding that the declaration stated a case of injury to the plaintiff.) It is further contended in behalf of the defendant that Collins being the injured party has his action for the injury done, and that the defendant ought not to be subjected to two actions for the same act.

It is admitted under the demurrer that this plaintiff was injured by the act of the defendant, which we hold was wrongful. It is no answer to a claim for this injury to say that this act also injured another party.

Each party suffering directly from a wrongful act is entitled to a remedy against the wrong-doer. A single act of trespass destroying one man's arm and another man's leg would create a right of

action in each separately. Further suggestion is made that the declaration contains no averment that the suit against Collins has terminated in his favor, and that the same rule should apply here as though this were his suit for malicious prosecution. This suggestion is made upon the assumption that the declaration shows a privity between Collins and the railroad company in respect to the subject-matter of the suit against Collins. Treating the assumption as correctly made, how does the case stand? The declaration states in substance that the suit against Collins was utterly groundless and hopeless. The demurrer admits this. The rule that the plaintiff in an action purely for malicious prosecution should allege, and prove that the original proceeding has terminated in his favor, rests on the ground that the court will not tolerate inconsistent judgments upon the same question between substantially the same parties. But there is a class of actions for malicious prosecution where it has been held that an admission that the alleged malicious suit could not be maintained obviated the necessity of proving it had terminated. *Wills vs. Noyes,* 12 Pick. 326; *Page vs. Cushing,* 38 Me. 527. In the latter case it was held that the admission may be by plea or by parol.

The court there say: "The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted wrong." This declaration does not state what became of the other suit. The demurrer admits it was malicious, false and hopeless. Any presumption of probable cause, or that Hunt was in the pursuit of a legal right against Collins, is overcome by the admission. The technical averment which this declaration lacks is supplied by averments admitted to be true, showing that the result must follow or must have occurred which the omitted averment would have alleged had occured. But if this answer to the above suggestion is unsound, upon what ground would this plaintiff be estopped by a judgment against the defendant in the former suit, so far as anything is disclosed in this declaration? It was not a party thereto, nor was it vouched in to defend. It neither assumed, nor had the opportunity to control the defense. It was not in a situation to prevent a judgment against the defendant therein by collusion, by default, by ignorance, or by concession or compromise.

Judgments are conclusive only upon parties and those claiming under them. This rule, upon the ground that a principal and

servant are substantially one in interest, might well be expanded so as to admit it in a suit against a servant when the same question has been decided and judgment rendered for the defendant in a suit against the master for the alleged trespass of the servant for which the master is responsible, as illustrated in the case of *Emery vs. Fowler*, 39 Me. 326, 63 Am. Dec. 627; but such is not this case. The general rule is that the master is responsible for the acts of the servant, but there are several exceptions. Dunlap's Paley, Agency, 298. There may also be wrongs committed by the servant for which the master only is responsible. 2 Hill. Torts, 554. The relative status of this plaintiff and its engineer as to the wrong charged upon the latter cannot be certainly determined from this declaration, but treating it as a trespass for which this plaintiff was responsible, then they could have been sued together or separately, and they could have defended each independently of the other. Judgment unsatisfied against either separately would be no bar to another suit against the other.

This point was settled early in this state in the case of *Sanderson vs. Caldwell*, 2 Aik. 195, where the authorities are cited and fully discussed by Judge PRENTISS. In the later case of *Andrus vs. Howard*, 36 Vt. 248, 84 Am. Dec. 680, the further question, somewhat controverted elsewhere, was here settled that the master is liable in trespass for an act of his servant, which is a trespass, though it occur through the neglect or unskillfulness of the servant. As joint trespassers, independent of the relation of master and servant, it is plain the former judgment for the plaintiff, if there was one, would not conclude this plaintiff. With this relation existing, if the judgment was there for the defendant, it is equally plain that it would not have concluded the plaintiff therein from another action against this plaintiff, if the former action failed, on the ground that the wrong which the former plaintiff suffered, though committed by the servant, was one for which this plaintiff only, if anybody, was liable. "No person can bind another by any adjudication, who was not himself exposed to the peril of being bound in like manner, had the judgment resulted the other way." Freeman on Judgments, § 154; or, as expressed by SPENCER, J., in *Case vs. Reeve*, 14 Johns. 83: "No person can derive benefit from a verdict who would not have been prejudiced by it, had it gone contrary." "If, therefore, a state of facts might be disclosed which would preclude the application of the maxim, *res inter alios*

acta, etc., which is doubtful, this declaration fails to disclose them. The reason of the maxim as expressed by Wharton, 184, is, that it would be unjust to bind a person by proceedings taken behind his back, to which he was, in fact, no party, and to which he had not an opportunity of making a defense, and from which he could not appeal. *Nason vs. Blaisdell*, 15 Vt. 171. We think no privity is disclosed in this declaration between the railroad company and its engineer, in respect to the point involved in the other action. It is further insisted that the action cannot be maintained because the damages are inconsequential and too remote. We think the injury and damages were direct. They were not only such as could reasonably have been contemplated at the time, which is one of the tests laid down in Sedgwick on Damages, vol. 1, marg. p. 66–7, but they were the damages actually contemplated. In *Derry vs. Flitner*, 118 Mass. 131, the court say: "A wrongdoer is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act." Sedgwick, 88, says the disposition of courts is to include in the injurious consequences, flowing from the illegal act, those that are "very remote." No extreme view is required here.

It cannot be said that the stoppage and delay of the plaintiff's train was a remote result of the defendant's act. It was the probable, if not necessary, result. And it was in fact the direct, proximate, immediate and contemplated result. Familiar cases, often cited as showing what damages are not too remote to be included in the recovery are, *McAfee vs. Crofford*, 14 How. 447; *Gunter vs. Astor*, 4 J. B. Moore, 12 (16 Eng. Com. Law, 357); *Gribb vs. Swan*, 13 Johns. (N. Y.) 381; *Vanderberg vs. Traux*, 4 Denio (N. Y.) 464, 47 Am. Dec. 268; *Burrows vs. Coke and Gas Co.*, L. R. 5 Ex. 67; *Scott vs. Kenton*, 81 Ill. 96; *Tarleton vs. McGawley*, Peake, 205. In the latter case it was held by Lord KENYON, at *Nisi Prius*, that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, so that the plaintiff lost their trade. There the trespass was directly against the negroes, but the wrong intended and the injury actually done was to the plaintiff.

The defendant cites the case of *Ashley vs. Harrison*, Peake, 194, where the proprietors of a theater brought an action against the defendant for having written a libel upon one of the plaintiff's singers, by which he was deterred from appearing, whereby

his profits were lost. Lord KENYON held that the damages were too remote, but this was on the ground that the damages arose from the vain fears or caprice of the actress. She could have sung but would not. Her fears or caprice intervened between the wrongful act and the alleged result. To make the case parallel to this she should have been driven from the stage while performing her part, by unlawful interference of the defendant, for the purpose of injury to the plaintiff. See *Hughes vs. McDonough*, 14 Vroom, 459, s. c., 39 Am. Rep. 603.

The *pro forma* decision of the county court is overruled, and the first count is adjudged sufficient, and the cause is remanded with leave to the defendant to replead, upon the usual terms.

Reversed and remanded.

NOTE.—See this case when before the court again; 60 Vt. 588, 6 Am. St. Rep. 138.

BOOK V.

PARTICULAR CLASSES OF AGENTS.

CHAPTER I

OF ATTORNEYS AT LAW.

I.

OF THE OFFICE.

(39 WISCONSIN, 509, 20 AM. REP. 55.)

MATTER OF MOSNESS.

(Supreme Court of Wisconsin, January, 1876.)

Motion for the admission of Ole Mosness to the bar of this court, as an attorney and counselor thereof. It appeared from his petition that he was a resident of the state of Illinois.

RYAN, C. J. It is, we believe, the general practice of courts of record in the several states, to permit gentlemen of the bar in other states to appear as counsel on the trial or argument of causes. Such has been the uniform practice of this court. And, under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other states to argue causes here, whenever they may appear here to do so. No license to practice here is necessary or proper for that purpose; the usual and proper practice being to grant leave *ex gratia* for the occasion.

But general license to practice here as attorney and counselor

rests upon quite different considerations. The bar is no unimportant part of the court, and its members are officers of the court. *Thomas vs. Steele*, 22 Wis. 207; *Cothren vs. Connaughton*, 24 Id. 134; see Bacon's Abr., Attorney, H; 1 Tidd's Prac. 60; 3 Black. 25; 1 Kent, 306; *Ex parte Garland*, 4 Wall. (U. S.) 333. And if officers of the court, certainly, in some sense, officers of the State for which the court acts. *Re Wood*, Hopk. (N. Y.) 6. This is not really denied in 20 Johns. (N. Y.) 492, decided in the same year. And if it were, we have no doubt that the chancellor was correct; and that attorneys and counselors of a court, though not properly *public officers*, are *quasi* officers of the State whose justice is administered by the court.

The state may have extra-territorial officers, as commissioners to take acknowledgments, etc. But these are exceptions; and the general business of the state, within the state, executive, legislative and judicial, must be performed by citizens or denizens of the state; and the officers charged with it must be residents of the state. *State vs. Smith*, 14 Wis. 497; *State vs. Murray*, 28 Wis. 96, 9 Am. Rep. 489.

So the courts may have extra-territorial officers, for extra-territorial functions, as commissioners to take depositions, etc. But for all functions within the jurisdiction of the courts, their officers must be residents of the state. This is essential to the nature of the functions themselves, and to the proper control of courts over their officers.

The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court and practically not subject to its authority. We take it, that members of the bar of this state lose their right to practice here by removing from the state. After they become nonresidents, they can appear in courts of this state *ex gratia* only. Our courts cannot have a non resident bar.

This all appears to us to be so very plain, that it is difficult to believe that ch. 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of

causes, of gentlemen of the bar of other States. If intended to do that it was probably unnecessary; if intended to do more, it was clearly without the power of the Legislature.

For the reason only that the gentleman whose admission is moved is not a resident of the State, the motion must be denied.

II

PRESUMPTION OF AUTHORITY.

(30 KANSAS, 106, 46 AM. REP. 86.)

REYNOLDS vs. FLEMING.

(Supreme Court of Kansas, January, 1883.)

Motion to set aside a judgment alleged to have been rendered without jurisdiction. The opinion states the facts. Judgment below for plaintiff.

Keller & Osterhold, for plaintiff in error.

Broderick & Rafter and *Hayden & Hayden,* for defendant in error.

HORTON, C. J. The evidence introduced upon the hearing of the motion of Robert M. Reynolds to set aside and vacate the judgment rendered against him on the 12th of June, 1882, material for our consideration, is in brief, that John S. Hopkins, an attorney at law, in a conversation with Case Broderick, one of the attorneys of W. J. Fleming about the time the action of Fleming against Reynolds was commenced, said to Broderick, to save the expense of publication he thought that Robert M. Reynolds would enter an appearance; that Hopkins filed an answer in the case for W. M. C. Reynolds, and on December 17, 1880, filed another answer and signed himself as attorney for R. M. Reynolds; that he filed the answer for W. M. C. Reynolds, because the latter requested him to attend to the matter for him; that W. M. C. Reynolds told him to stop proceedings against his brother, but at the same time said he was not the agent for his brother and had no authority to contract for him; that after he filed the answer to which he attached his name as attorney for R. M. Reynolds he sent a copy of it to R. M. Reynolds at Wash-

ington, D. C., but Reynolds never returned this copy; instead thereof he sent Hopkins a letter, in which he informed him he had not authorized his brother to act for him, and that he refused to have anything to do in the matter; that after Hopkins received this letter from Robert M. Reynolds, which was shortly after sending him a copy of the answer, and before the trial, he told Broderick he had nothing further to do with the case, and would not appear further for Robert M. Reynolds.

Hopkins also testified that he said to Broderick before the trial, "He had better proceed to get service by publication." Broderick testified that "Hopkins told him the reason he had nothing further to do with the case was on account of fees, and he did not recollect that Hopkins said to him anything about publication subsequent to the filing of the answer."

W. M. C. Reynolds testified that he advised his brother, Robert M. Reynolds, of the commencement of the suit, soon after it was begun. Robert M. Reynolds testified that he owned the real estate decreed to be sold to satisfy the judgment rendered on said June 12th and that he resided at Washington, D. C.; had lived there for four years, but was in Kansas some time in 1879; that he never employed W. M. C. Reynolds, his brother, to act as agent in getting legal advice or counsel, or to employ an attorney in the action of W. J. Fleming against himself; that he never filed an answer in the case, or authorized anyone to make answer for him; that he utterly refused to make answer to the proceedings, and that the answer filed by Hopkins was done so without his authority or knowledge or consent; that when he received a letter from Hopkins inclosing a paper to be signed as an answer in the case, he promptly replied by saying he utterly refused to become a party to the proceedings, and refused to sign or return the paper; that he then notified Hopkins he could not recognize him as his attorney in the case, and since that time he has never written to him or spoken to him about the matter; that Hopkins has not presented his bill for alleged legal services, and that he had not paid him in any way whatever; that he was never notified by Hopkins that he had filed any paper in the proceeding as his agent or attorney, and at no time did Hopkins apprise him of his appearing for him, and that he did not understand an answer was filed in the case until appraised of it by Keller & Osterhold, attorneys at law, subsequent to the rendition of the judgment; that the first notice he had of the judgment against himself was the notice in a

newspaper sent him by some person unknown, that the land was to be sold by the sheriff of Jackson county; that subsequently he received a copy of a like notice from his brother.

The evidence of Robert M. Reynolds was introduced by deposition, and the statements therein contained, that the voluntary appearance by Hopkins in the action for said Reynolds was unauthorized, and that he had no knowledge of the filing of the answer in his behalf prior to the rendition of the judgment, were uncontradicted.

Applying the law, as we understand it, to the facts established upon the hearing of the motion, the court below should have sustained the motion and vacated the judgment. In this state it is held that a judgment rendered without jurisdiction is void; that a personal judgment rendered without notice to the defendant is rendered without jurisdiction, and is consequently void; that a judgment void for want of notice may be set aside, on a motion made therefor by the defendant; and that this may be done in cases where it requires extrinsic evidence to show the judgment was rendered without notice and without jurisdiction. Civil Code, sec. 575; *Butcher vs. Bank,* 2 Kans. 70, 83 Am. Dec. 446; *K. P. R. Co. vs. Streeter,* 8 Id. 133; *Foreman vs. Carter,* 9 Id. 674; *Hanson vs. Wolcott,* 19 Id. 207; *Mastin vs. Gray,* Id. 458, s. c. 27 Am. Rep. 149.

The authority of an attorney to appear for the party whom he professes to represent, is presumed until the contrary is shown; and it devolves upon the party impeaching the authority to show by positive proof that it is invalid. In some of the states, and in many of the early decisions, it is held that the appearance of an attorney for a defendant, even without authority, is deemed sufficient to give the court jurisdiction over his person; and upon such appearance the court will proceed to judgment, and leave the defendant to his remedy against the attorney, unless the attorney is insolvent, or, appears under suspicious circumstances, or through the procurement of the plaintiff. But the better authorities uphold the doctrine that any judgment rendered without jurisdiction, when assailed directly may be impeached, and that in doing so, anything contained in the record purporting to give or prove jurisdiction, as the appearance of an attorney, may be contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false. *Mastin vs. Gray, supra.*

In this case the appearance of an attorney was impeached by a

motion in the court rendering the judgment, and the motion is in the nature of a direct proceeding attacking it. If the attorney Hopkins appeared for R. M. Reynolds without his knowledge or authority, express or implied, he ought not to be bound by the act, if never ratified, and promptly disavowed. As Robert M. Reynolds was never served by summons or by publication, the court had no jurisdiction of his person, unless jurisdiction was given by the appearance of the attorney; and if the appearance of the attorney was unauthorized, the judgment obtained thereon, within the latter decision, is void. DILLON, J., speaking for the court in *Harshey vs. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520, said: "Certain it is, however, that the party is entitled to relief when an unjust judgment, though a domestic one, has been rendered against him by fraud or collusion, or by the appearance of an unauthorized attorney, if the party seeks the relief by appeal or motion promptly, and has been guilty of no laches."

In *Shelton vs. Tiffin*, 47 U. S. 163, 6 How. 163, it was decided: "Where a citizen of Virginia sued in the circuit court of Louisiana two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri was at liberty to show that the appearance for him was unauthorized. If he showed this, he was not bound by the proceedings of the court, whose judgment, as to him, was a nullity."

In *Critchfield vs. Porter*, 3 Ohio, 518, it was held, "That when an attorney appears for a party in a suit in court without authority, the party is not concluded by his acts, but may be relieved against them." And in the opinion supporting this declaration of law, it was said by SHERMAN, J.: "The mischief that might follow from holding that the acts of the unauthorized attorney are conclusive upon the person for whom he appears, would induce the court to hesitate long before it would establish such a rule. It would in some degree subject the property of every individual in the community to the mistakes or malice of a particular class of men."

See for authorities of like tenor *Lawrence vs. Jarvis*, 32 Ill. 304; *Arnott vs. Webb*, 1 Dill. 362; *Price vs. Ward*, 1 Dutch. 225; *Pennywit vs. Foote*, 27 Ohio St. 600, s. c. 22 Am. Rep. 340; *Dobbin vs. Dupree*, 39 Ga. 394; *Wiley vs. Pratt*, 23 Ind. 628. See, also, *Wetherby vs. Wetherby*, 20 Wis. 526; *Ferguson vs. Crawford*, 70 N. Y. 253, s. c. 26 Am. Rep. 589; *Clark vs. Little*, 41 Iowa, 497; *Mastin vs. Gray, sup*

(Minor matter omitted).

The ruling and judgment of the district court, will be reversed, and the cause remanded.

Judgment reversed and cause remanded.

III.

IMPLIED AUTHORITY OF ATTORNEY.

(115 MASSACHUSETTS, 36, 15 AM. REP. 72.)

MOULTON vs. BOWKER.

(Supreme Judicial Court of Massachusetts, March, 1874.)

It was agreed between the parties that the only legal question was whether an attorney of record can discharge an attachment without the knowledge or authority of his client, and in fraud of his rights, in such a way that a subsequent *bona fide* purchaser can get a good title.

R. M. Morse, Jr., & A. E. Pillsbury, for demandants.[1]

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[1] NOTE.—The following is an abstract of their brief: An attorney is not *dominus litis*. He has no power to give up the security of his client without payment or express authority. *Terhune vs. Colton*, 2 Stock. Ch. 21; *Tankersley vs. Anderson*, 4 Dessaus. 45. Nor to release sureties upon the claim of his client. *Savings Inst. vs. Chinn*, 7 Bush (Ky.), 539; *Givens vs. Briscoe*, 3 J. J. Marsh. (Ky.) 529, 532; *Union Bank vs. Govan*, 10 Sm. & M. (Miss.) 333. Nor to discharge a lien created by levy of execution. *Banks vs. Evans*, 10 Sm. & M. 35, 48 Am. Dec. 734; *Benedict vs. Smith*, 10 Paige (N. Y.), 126. Nor to release a lien obtained by judgment, or to discharge any security resulting from his prosecution of the claim. And an honest belief that he is acting in his client's interest cannot supply the defect of authority to make such an arrangement. *Wilson vs. Jennings*, 3 Ohio St. 528.

He may control the manner of conducting a cause, but cannot waive any substantial acquired right of his client. *Howe vs. Lawrence*, 2 Zab. (N. J.) 99. He may not release a third person for the purpose of making him a competent witness. *Shores vs. Caswell*, 13 Metc. (Mass.) 413; *Succession of Weigle*, 18 La. An. 49; *Marshall vs. Nagel*, 1 Bailey, (S. C.) 308. Nor discharge an indorser upon a note committed to him for collection without satisfaction or the express consent of his client. *East River Bank vs. Kennedy*, 9 Bosw. 543; *Bowne vs. Hyde*, 6 Barb. 392; *Kellogg vs. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; *Simonton vs. Barrell*, 21 Wend. (N.

J. L. Thorndike, for tenant.

GRAY, C. J. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action; and we can have no doubt that this includes the power to release an attachment, at least before judgment, which is all that this case requires us to consider. *Lewis vs. Sumner,* 13 Metc. 269; *Shores vs. Caswell,* Id. 413; *Wieland vs. White,* 109 Mass. 392; *Jenney vs. Delesdernier,* 20 Me. 183; *Rice vs. Wilkins,* 21 Id. 558;

Y.) 362; *York Bank vs. Appleton,* 17 Me. 55; *Varnum vs. Bellamy,* 4 McLean, 87. Nor sell or assign a judgment of his client. *Maxwell vs. Owen,* 7 Coldw. (Tenn.) 630; *Baldwin vs. Merrill,* 8 Humph. (Tenn.) 132; *Campbell's Appeal,* 29 Penn. St. 401, 72 Am. Dec. 641; *Rowland vs. State,* 58 Id. 196. Nor discharge a judgment or execution except on payment in full. Per COKE, C. J., 1 Rol. R. 366; *Beers vs. Hendrickson,* 45 N. Y. 665; *Lewis vs. Woodruff,* 15 How. Pr. 539, and cases cited; *Wilson vs. Wadleigh,* 36 Me. 496, and cases cited; *Harrow vs. Farrow,* 7 B. Monr. (Ky.) 126, 45 Am. Dec. 60; *Chambers vs. Miller,* 7 Watts (Pa.), 63. Nor receive any other thing than lawful money in payment of his client's claim. *Stackhouse vs. O'Hara,* 14 Penn. St. 88; *Harper vs. Harvey,* 4 W. Va. 539, following *Smock vs. Dade,* 5 Rand. (Va.) 639, 16 Am. Dec. 780; *Jeter vs. Haviland,* 24 Ga. 252; *Miller vs. Edmonston,* 8 Blackf. (Ind.) 291; *Jones vs. Ransom,* 3 Ind. 327; *Trumbull vs. Nicholson,* 27 Ill. 149, and cases cited; *Lawson vs. Pettison,* 7 Eng. (Ark.) 401; *Kent vs. Ricards,* 3 Md. Ch. 392; *Walker vs. Scott,* 8 Eng. (Ark.) 644; *Bailey vs. Bagley,* 19 La. An. 172; *Wright vs. Daily,* 26 Tex. 730; *West vs. Ball,* 12 Ala. 340; *Clark vs. Kingsland,* 1 Sm. & M. (Miss.) 248. Nor indorse a note left with him for collection. *Child vs. Eureka Powder Works,* 44 N. H. 354. Nor compromise a suit. By the Master of the Rolls in *Swinfen vs. Swinfen,* 27 L. J. (Ch.) 35; affirmed by Lords Justices, 2 DeG. & J. 381. MARSHALL, C. J., in *Holker vs. Parker,* 7 Cranch. (U. S.) 436; *Stokely vs. Robinson,* 34 Penn St. 315; *Huston vs. Mitchell,* 14 S. & R. (Pa.) 307; *Dodds vs. Dodds,* 9 Penn. St. 315; *Abbe vs. Rood,* 6 McLean, 106; *Derwort vs. Loomer,* 21 Conn. 245; *Kelley vs. Scott,* 2 Sm. & M. 81. Nor employ associate counsel, save in the absence of his client. *Briggs vs. Georgia,* 10 Vt. 68. Nor waive the right of inquisition. *Hadden vs. Clark,* 2 Grant, (Pa.) 107. Nor accept service of summons. *Masterson vs. Le Claire,* 14 Minn. 163. Nor consent to a judgment against his client. *People vs. Lanborn,* 1 Scam. (Ill.) 123. Nor enter a *retraxit. Lambert vs. Sanford,* 2 Blackf. (Ind.) 137, 18 Am. Dec. 149. Nor make an agreement for suspension of proceedings upon a judgment. *Pendexter vs. Vernon,* 9 Humph. (Tenn.) 84. Nor discharge a trustee. *Quarles vs. Porter,* 12 Mo. 76. Nor give an extension of time upon a debt due to his client. *Lockhart vs. Wyatt,* 10 Ala. 231, 44 Am. Dec. 481. Nor transfer to another the property in a note committed to him for collection. Nor bind his client by an agreement to refund money overpaid. *Ireland vs. Todd,* 36 Me. 149.

Pierce vs. Strickland, 2 Story 292; *Levi vs. Abbott*, 4 Exch. 588.

The act of the demandants' attorney was therefore within his professional authority, and bound his clients, and if it was fraudulent, their remedy must be sought against him, it being agreed that the other party was not cognizant of any fraud.

Judgment on the verdict for the tenant.

(87 PENNSYLVANIA STATE, 243, 30 AM. REP. 357.)

KIRK'S APPEAL.

(Supreme Court of Pennsylvania, May, 1878.)

Appeal from decree of distribution of fund arising from sheriff's sale of real estate. The opinion states the case.

H. M. Baldridge, for appellant.

Samuel S. Blair, for appellee.

MERCUR, J. This contention arises on the distribution of a fund produced by a sheriff's sale of real estate. The rights of the claimants depend on the effect to be given to a release executed by E. Hammond, of the lien of the judgment on which the appellants claim the money. The judgment was recovered by McNeal. In the assignment thereof, which he made to Hammond, he declared it was "to be held by Hammond as collateral security for the payment of the claim of Boggs & Kirk, for which claim I have this day given to the said Boggs & Kirk three promissory notes." This assignment was filed of record. The prothonotary entered on the docket the substance of the assignment, and added, "See paper filed."

Hammond was an attorney at law. As attorney for Boggs & Kirk he took the notes of McNeal for a debt due them, and accepted the assignment. He therefore held it for their benefit. The assignment showed this fact. As between him and them he had no more right to release the lien of the judgment on lands bound thereby, than he had to give up the notes to the maker without payment.

In conducting a suit, an attorney at law has large powers. After judgment recovered, he may execute a valid receipt on its payment. Yet he cannot sell and assign it without the ratification of his client

Campbell's Appeal, 5 Casey (Pa.) 401. Nor can he accept land in satisfaction of a debt of his client. *Huston vs. Mitchell*, 14 S. & R. 307, 16 Am. Dec. 506; *Stackhouse et al. vs. O'Hara*, 2 Harr. 88; *Stockley vs. Robinson*, 10 Casey, 315. His authority is limited to the discharge of that profesional action which lies at the foundation of the relation of counsel and client. He has large discretionary power as to the manner and time of prosecuting his client's claim to judgment. He may order and direct the sheriff in regard to the collection of the execution. These powers are given to him to protect the rights and advance the interests of his client. He has no right to release property bound by his client's judgment. This appears to have been conceded by the learned judge if the record had showed Hammond held the assignment as attorney for Boggs & Kirk. It is true the record did not distinctly show that fact; yet we think it showed enough to have put the appellee on inquiry, and if so, inquiry thereupon become a duty.

The exercise of common prudence and ordinary diligence, which he was bound to use, would have disclosed to him that Hammond held the assignment as attorney or counsel for Boggs & Kirk. *Lodge vs. Simonton*, 2 P. & W. (Pa.) 439, 23 Am. Dec. 36; *Cresson vs. Miller*, 2 Watts, (Pa.) 272; *Jaques vs. Weeks*, 7 Id. 261; *Walsh vs. Stille*, 2 Pars. 17; *Hill vs. Epley*, 7 Casey, 331. The release itself cannot be found, but the record entry recites, "For value received, E. Hammond, Esq., releases from the lien of this judgment the real estate of Peter S. McCormick, but does not satisfy the judgment or any part thereof; see paper filed." Thus the record not only shows the assignment to be for the benefit of Boggs & Kirk, but also that Hammond executed the release without any payment on the judgment. A release, by one who held the legal title only, which proclaimed no payment on the judgment, and presumptively no consideration to the use party, should have put the appellee on inquiry. The language of the record gave sufficient notice of an implied breach of trust to make inquiry a duty. Failing to inquire, he must be affected by the facts which a due investigation would have disclosed. Those facts show Hammond was the attorney of Boggs & Kirk; that this release was a fraud on them; that it was made without their knowledge, and never ratified by them. The learned judge therefore erred in holding that the release, thus executed, discharged the lien.

Decree reversed, and record remitted, with instructions to decree

distribution conformably with this opinion. It is further ordered that the appellee pay the costs of this appeal.

Judgment reversed.

IV.

LIABILITY OF ATTORNEY FOR MONEY COLLECTED.[1]

(108 INDIANA, 500, 58 AM. REP. 61.)

NALTNER vs. DOLAN.

(Supreme Court of Indiana, November, 1886.)

Facts are stated in the opinion.

S. Claypool & W. A. Ketcham, for appellant.

J. R. Courtney, for appellee.

MITCHELL, J. Naltner, on the 24th day of February, 1883, commenced proceedings in attachment against Dolan, and on the same day caused a summons in garnishment to be served on the appellants herein. On the 7th day of March following, upon his intervening petition, Montague was admitted as a party to the proceeding. He filed a cross complaint, in which he alleged, in substance, that the fund in the hands of the appellants, being the subject of the attachment and garnishee proceeding, had been assigned to him by Dolan for a valuable consideration, before the proceedings were commenced. He prayed judgment for the recovery of the money.

The appellants, with the general denial, answered specially, admitting the possession of a fund which they averred had come to their hands as the attorneys of Dolan. They alleged that they had been notified by Montague of his claim after the proceedings in garnishment had been commenced, and averred their readiness to pay the money to whomsoever the court should adjudge entitled thereto. Other answers were filed, to which demurrers were sustained.

The facts were found specially by the court, and are presented in

[1] See *Cummins vs. Heald, ante,* p. 247; *Exchange Nat. Bank vs. Third National Bank, ante,* p. 239.

the following summary: Dolan, who at the time the suit was commenced lived in Illinois, owed Naltner $600 then due. The appellants, as attorneys, had in their hands for collection a claim in favor of Dolan, against the Indiana, Bloomington & Western Railway Company, which Dolan, on the 13th day of September, 1882, transferred for value to Montague. On February 24, 1883, the day on which the attachment suit commenced, appellants received from the clerk of the United States district court, for the district of Indiana, checks for something over $80,000 which was in payment of claims against the Indiana, Bloomington & Western Railway Company, which payment was made to them in behalf of Dolan and many others of their clients. Dolan's claim against the railway company was $600. Upon receiving the check they deposited it with the Indiana Banking Company, which was then in good standing, the deposit being to the credit of themselves in their firm name. The money thus received belonged to some hundreds of their clients, and the computation of interest, and the division to each of his share required several days' continuous work before distribution could be made.

The appellants were lawyers, partners, actively engaged in practice.

They had an account at the bank in question in which all money collected for, and belonging to their various clients was deposited and checked out in the firm name, but such moneys were not mingled with their own.

Before they had time or opportunity to pay out the money in controversy, the appellants were garnished at the suit of Naltner. They received notice of the assignment to Montague, February 28, 1883, four days after the suit was commenced. Montague, within a few months after giving notice of his claim, and while the proceedings in garnishment were pending made demand on garnishee defendants for the money remaining in their hands which was derived from the Dolan claim.

On the 9th day of August, 1883, the Indiana Banking Company, having until that time continued in good standing and credit, failed. A receiver was appointed for the bank August 13, 1883. The appellants brought the certificate of the receiver of the bank for the money in dispute into court, and offered to surrender it to the person entitled as the court should direct. The amount remaining in their hands in the manner above stated, was $445.69.

Conclusions of law were stated favorable to a recovery by Mon-

tague against the appellants of the amount thus remaining in their hands.

Do the facts found warrant the conclusion of law stated?

Money belonging to a client having been received by the attorneys, in payment of a claim left with them for collection, the transmission of such money having been arrested by garnishee process before an opportunity for transmitting it occurred, the question is, having acted in the utmost good faith, and without any suggestion of fault or neglect, are the attorneys responsible for the continued solvency of the bank in which such funds were deposited in their own name, but not with their own funds, notwithstanding the bank was in good credit when the deposit was made?

The receipt of money by an attorney, under the circumstances disclosed in this case, does not *ipso facto* create the technical relation of debtor and creditor between the attorney and client. It is because it does not that a suit cannot be maintained by the latter against the former without first making a demand. Money so collected belongs to the client. The attorney occupies toward it the relation of a trustee, so long as he chooses to treat and preserve the fund as a trust fund. The circumstances under which he will be liable for its loss are precisely those which govern in the case of any other trustee. While it is preserved in its trust character, if he exercises the same caution in respect to depositing it, if a deposit becomes necessary or proper, as a prudent man would in regard to his own money, and a loss happens, he will be excused. *Norwood vs. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *State, ex rel., vs. Greensdale*, 106 Ind. 364, 55 Am. Rep. 753.

The authorities, however, distinguish between cases in which the deposit was made in such a manner as to preserve its trust character on the books of the bank in which the fund was deposited, and those in which the owner of the fund might be put to the trouble of proving by extraneous evidence that the fund was not the individual money of his trustee. Whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the *cestui que trust* has his election, either to treat the fund according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such a manner, as on the face of the books of

the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise. *Merket vs. Smith,* 33 Kans. 66; *McAllister vs. Commonwealth,* 30 Penn. St. 536; *Morris vs. Wallace,* 3 Penn. St. 319, 45 Am. Dec. 642; *Jackson vs. Bank, etc.,* 10 Penn. St. 61; *School District, etc., vs. First Nat'l Bank,* 102 Mass. 174; *Utica Ins. Co. vs. Lynch,* 11 Paige, 520; *Bartlett vs. Hamilton,* 46 Me. 435; 2 Pom. Eq. Jur. §§ 1067–1076; Perry Trusts, §§ 443, 444; Story Agency, § 208.

In case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank, as to indicate in some way that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal. *Williams vs. Williams,* 55 Wis. 300, 42 Am. Rep. 708; *Norris vs. Hero,* 22 La. An. 605; *Mason vs. Whitthorne,* 2 Cold. (Tenn.) 242; *Jenkins vs. Walter,* 8 G. & J. (Md.) 218, 29 Am. Dec. 539; *Robinson vs. Ward,* 2 C. & P. 60; *Macdonnell vs. Harding,* 7 Sim. 178; *State vs. Greensdale, supra.*

In such a case the good faith or intention of the trustee is in no way involved. Having for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows as a necessary consequence, when a loss occurs, he will not be permitted to say, as against his *cestui que trust* that the fact is not as he voluntarily made it appear.

What the legal or equitable rights of the real owner of the fund would be in such a case, as against the bank or as against attaching creditors of the depositor, has been the subject of much discussion, and of some diversity of opinion. *Pennell vs. Deffell,* 4 De G., M. & G. 372; *Farmers' etc., Bank vs. King,* 57 Penn. St. 202, 98 Am. Dec. 215, (*ante,* p. 590); *School District, etc., vs. First Nat'l Bank,* 102 Mass. 174; *Jackson vs. Bank, supra*; *Bundy vs. Town of Monticello,* 84 Ind. 119, 131, and cases cited; *McLain vs. Wallace,* 103 Ind. 562; *McComas vs. Long,* 85 Ind. 549; *Ellicott vs. Barnes,* 31 Kans. 170, 173; Morse Banks, 300–302.

Whatever diversity of opinion may be found in respect to the rights of the bank, or other creditors of the depositor, the authorities agree that a trustee who either invests or deposits trust money

in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund while so invested or deposited. *Gilbert vs. Welsch*, 75 Ind. 557; 2 Lead. Cas. in Eq. 1805.

Having put the owner of the fund to the hazard of losing it, or of maintaining its trust character by such proof *aliunde* as may be available to him, the trustee thereby gives the former the privilege of treating the latter as his debtor, or of supplying the proof, or accepting his admission of the facts, at his option.

Applying the principles stated to the facts found, the conclusion follows, that the appellants assumed the risk that the bank, in which the fund was deposited in their name, and from which it could only have been drawn by their check, would be able to respond with the money when their check for it should be presented.

The fact that none but money belonging to clients was deposited in the account in which the fund in question was placed does not alter the case. The controlling consideration is, that it was deposited to the credit of the firm, without anything to designate or preserve its trust character. They took and retained the legal title to the deposit in themselves. In the event of a controversy, the character of the fund would have depended wholly on extraneous proof. This being so, the owner had the right to elect to stand upon the title to the deposit, as he found it. Having so elected, there is no rule of law which authorizes any inquiry into the motives for so taking the title, short of an express or implied direction from the owner of the fund.

The judgment is affirmed, with costs.

Rehearing denied. Judgment affirmed.

V.

DEALINGS BETWEEN ATTORNEY AND CLIENT.

(98 NEW YORK, 25, 50 AM. REP. 632.)

STOUT vs. SMITH.

(New York Court of Appeals, January, 1885.)

This was an action to recover damages on account of fraud arising out of various transactions in the exchanging or sale of farms between defendant and Alfred and Andrew Stout, the latter having since died. The opinion states the facts.. Plaintiff had judgment below.

David B. Hill, for appellant.

Rufus King, for respondents.

MILLER, J. (After stating the facts.) We think there was no sufficient evidence that the relationship of attorney and client existed between the defendant and the Stouts. Although the defendant was an attorney at law, his principal business was that of a banker, and he did not practice law to any great extent, only making collections for his bank, and occasionally for others. There is no positive evidence that he was employed by the Stouts, as their attorney in these transactions, or that he ever received any pay for his services as such attorney, or that he was ever employed by them in any litigation. On the contrary, it is proved by one of the Stouts himself, that he was the attorney against them in the foreclosure of a mortgage.

The evidence, which it is claimed shows that this relationship existed, is within a narrow compass, as will be seen by a brief reference to the same. Alfred Stout, after stating that defendant had never been employed by him as an attorney up to the time of the transactions in question, testified that the defendant did all the writing between them and stated that it would not cost the Stouts anything, and that they need not carry the papers to anybody else to show them, because they were right; that he claimed to be a lawyer, which fact the witness knew, and said that he would not wrong them out of a cent. Lydia Stout, the widow of Andrew, deceased, who was present at the time mentioned by

Alfred, states that she heard no more about his being a lawyer than that he claimed that he was when he wanted to draw up the papers; that he was a lawyer and his writing should not cost him anything; that he was a lawyer and could do the business.

This evidence, taken together, does not establish that the relationship of attorney and client existed between the parties. The fact that the defendant was an attorney, and that he was willing to do all the writing without compensation, is not enough to show the existence of such a relationship. The papers which were drawn were in proper form, and no legal advice was required in regard to the same. No advice was offered or obtained, and the defendant never received a retainer or agreed to act as an attorney for the Stouts.

It nowhere appears that he assumed the obligations of a professional man in these transactions, or that the Stouts regarded him as acting in that capacity. He was merely engaged as an individual in making a bargain for the sale or exchange of real estate, and evidently drew up the papers gratuitously, without assuming to act as attorney for the Stouts. The defendant, as an individual, had a perfect right to make a bargain with the Stouts as he did, and draw up the papers without charge, and he did not thereby necessarily place himself in the position of the attorney or adviser of those with whom the bargain was entered into. If he, in these transactions, gained any advantage, it did not arise from the relationship of attorney and client, but from the fact that he was dealing with persons of less capacity than himself to make a bargain or transact business. He may have been chargeable with deceit and fraud, and therefore liable if they were proved against him, but under the circumstances there seems to be no valid ground for the contention that he was liable for a violation of his duty in a professional capacity. As the case stood, there was not sufficient evidence to establish the fact that the relationship of attorney and client existed between the defendant and the Stouts, and that question was improperly submitted to the consideration of the jury.

We are also of the opinion that the court erred in submitting the question of undue influence to the jury. As the relationship of attorney and client did not exist between defendant and the Stouts, it is difficult to see upon what ground it can be claimed that undue influence was exercised over them in the transactions between the parties. Undue influence is generally understood to

constitute the power which one party wrongfully exercises over another in attempting to control the judgment and influence the action of such other person for the benefit of himself. The evidence in this case does not show any such confidential relationship or intimacy between the parties as would authorize the conclusion that the defendant improperly influenced the Stouts in the transactions he had with them. Nor is it apparent from the position he occupied that the defendant possessed the power to induce the Stouts to act against their own interest, or that any such control was exercised by him. Alfred and Andrew were possessed of ordinary intelligence, could read and write, and had an opportunity to examine, or to have examined the papers which passed between them and the defendant, and there is no evidence in the case which tends to establish that in the various transactions between the parties they were induced by the defendant, by means of undue influence, to act in opposition to what they supposed was for their own benefit.

The fact that the defendant was engaged in a business from which it may be inferred that he was better qualified to make bargains and to obtain advantages by reason of his capacity, shrewdness and superior ability, does not of itself lead to the conclusion that any advantage was obtained by means of undue influence. He may have deceived and he may have defrauded the Stouts in his dealings with them, but it cannot, we think, be maintained that he did so through any improper influence employed for that purpose. A person of great intelligence, experience and adroitness in business affairs will naturally have an advantage over one more ignorant and less qualified to engage in such matters, and the superior mind must necessarily exercise more or less control over the inferior, but this is not undue influence. If a man deals dishonestly, and is chargeable with fraud and deceit in his transactions, he is liable to answer on that account. Such conduct, however, in the absence of any definite and established relation of confidence, does not furnish any valid legal ground for setting aside a contract in an action for the recovery of damages by reason of undue and improper influence exercised over the party with whom he has been dealing.

The evidence given upon the trial mainly bore upon the question of fraud, and deceit practiced by the defendant upon the Stouts, and as the facts developed did not establish undue influence, they do not require an elaborate examination. It is sufficient to say that in view of the evidence, a case involving the principle of

undue influence does not arise, nor was it proper to present any such question to the consideration of the jury.

Several questions as to the admissibility of evidence were raised upon the trial, but inasmuch as a new trial must be granted for the reasons already stated, it is not necessary to consider them.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, RUGER, C. J., and EARL, J., on the first ground.

VI.

ATTORNEY'S COMPENSATION.

(93 UNITED STATES, 548.)

STANTON vs. EMBREY.

(United States Supreme Court, October, 1876.)

Action by Embrey, as administrator of one Atkinson, deceased, an attorney, to recover for services rendered by Atkinson in prosecuting for defendants a claim against the government. Atkinson recovered a judgment but died before its payment. The services were rendered upon a contract for a contingent compensation, but the amount was not fixed. Judgment below for the plaintiff.

T. J. Durant, for plaintiffs in error.

Edward Lander, contra.

CLIFFORD, J. (After disposing of a question of practice.) Coming to the merits, the first objection of the plaintiffs in error is that the contract set up in the declaration is one for a contingent compensation. Such a defense, in some jurisdictions, would be a good one; but the settled rule of law in this court is the other way. Reported cases to that effect show that the proposition is one beyond legitimate controversy. *Wylie vs. Coxe*, 15 How. (U. S.) 415; *Wright vs. Tebbitts*, 91 U. S. 252.

Professional services were rendered by an attorney in the first case cited, in prosecuting a claim against the Republic of Mexico, under a contract that the attorney was to receive five per cent of

the amount recovered. Valuable services were rendered by the attorney during the lifetime of the claimant, but he died before the claim was allowed. Subsequently the efforts of the attorney were successful, and he demanded the fulfillment of the contract, which was refused by the administrator of the decedent. Payment being refused, the attorney brought suit; and this court held that the decease of the owner of the claim did not dissolve the contract, that the claim remained a lien upon the money when recovered, and that a court of equity would exercise jurisdiction to enforce the lien, if it appeared that equity could give him a more adequate remedy than he could obtain in a court of law. Courts of law also adopt the same rule of decision, as sufficiently appears from the second case cited, where the same rule of decision was applied and enforced without hesitation or qualification. Contracts for lobbying stand upon a very different footing, as was clearly shown by the chief justice in commenting upon a prior decision, in which the opinion was given by Justice SWAYNE. *Trist vs. Child*, 21 Wall. (U. S.) 450.

Nothing need be added to what is exhibited in the case last mentioned to point out the distinction between professional services of a legitimate character, and a contract for an employment to improperly influence public agents in the performance of their public duties. *Tool Co. vs. Norris*, 2 Wall. (U. S.) 53. Professional services to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented or the defense set up against a claim presented by the other party ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment, and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation, or unfairness. By the contract in question, the amount of compensation to be paid was not fixed; and in order to enable the jury to determine what the plaintiff was equitably entitled to recover, he called other attorneys, and proved what is ordinarily charged in such cases; and the defendants excepted to the ruling of the court, in refusing to charge the jury that they should disregard such testimony.

Attorneys and solicitors are entitled to have allowed to them for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the service and

their own standing in the profession for learning, skill, and proficiency; and, for the purpose of aiding the jury in determining that matter, it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court. *Vilas vs. Downer*, 21 Vt. 419. * * * Affirmed.

NOTE.—Compare with *Vilas vs. Downer*, 21 Vt. 419, *Eggleston vs. Boardman*, 37 Mich. 14; *Bruce vs. Dickey*, 116 Ill. 527. See, also, *Mills vs. Mills*, *ante*, p. 17; *Elkhart County Lodge vs. Crary*, *ante*, p. 18.

VII.

ATTORNEY'S LIEN.

(112 NEW YORK, 157.)

GOODRICH vs. McDONALD.

(New York Court of Appeals, January, 1889.)

Plaintiff's intestate, who was an attorney, had been attorney for Mrs. Graves, a daughter of Mrs. McDonald, the defendant. He had prosecuted a case for her successfully in the United States Circuit Court, from which an appeal was taken to the United States Supreme Court. Pending the appeal, the attorney died, and another was employed to argue the case in the Supreme Court, where the judgment was affirmed. When the judgment was to be paid, plaintiff was notified, but he wrote that he was willing that Mrs. Graves should receive the money and he would look to her for the pay for intestate's services, and the money was paid to her. She failed to pay, and he obtained judgment against her. Plaintiff then sought to reach a mortgage transferred to Mrs. McDonald by Mrs. Graves, on the ground that the mortgage was purchased with the proceeds of the judgment on which his intestate had had a lien. He succeeded in the court below.

Matthew Hale, for appellant.

H. V. Howland, for respondent.

EARL, J. The judgment in the action brought by Mrs. Graves against Porter and others was perfected on the 26th day of June,

1877, about two years before the amendment of section 66 of the Code of Civil Procedure enlarging the scope of that section, so that now an attorney who appears for a party has a lien upon his client's cause of action, which attaches "to a verdict, report, decision or judgment in his client's favor and the proceeds thereof, in whosoever's hands they may come." The section as amended was prospective only in its operation and can have no effect upon a judgment previously recovered; and so it was held by the trial judge. Therefore, in the examination of the case, it is not necessary to take further notice of the section; nor is it necessary to give any attention to the adjudication in the former action by the plaintiff against Mrs. Graves, as that action was commenced after the assignment of the bond and mortgage to Mrs. McDonald, and she was not a party thereto, and, therefore, not bound by the adjudication therein.

Attorneys have two kinds of liens peculiar to them in their relations with their clients. One is a lien which an attorney has upon all the papers of his client in his possession, by virtue of which he may retain all such papers until his claim for services has been discharged. That in the books is called a retaining lien. An attorney also has a lien upon the fund, or judgment which he has recovered for his compensation as attorney in recovering the fund or judgment, and that is denominated a charging lien. Stokes on Liens of Attorneys, 5, 85; *In re Wilson*, 2 McCarty Civ. Pro. 151. It is the latter kind of lien with which we are concerned in this case.

The practice of enforcing such liens is not very ancient. Baron PARKE in *Barker vs. St. Quintin*, 12 Mees. & Wels. 441, stated that the doctrine of an attorney's lien on a judgment was first established in the case of *Welsh vs. Hole*, 1 Doug. 238, where Lord MANSFIELD said: "An attorney has a lien on the money recovered by his client for his bill of costs. If the money come to his hands he may retain to the amount of his bill. He may stop it in transitu if he can lay hold of it. If he apply to the court they will prevent its being paid over till his demand is satisfied. I am inclined to go still further, and to hold that, if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice. But I think we cannot go beyond these limits." That great jurist in *Wilkins vs. Carmichael*, 1 Doug.

104, speaking of an attorney's lien also said: "It was established on general principles of justice, and that courts, both of law and equity, have now carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he had been employed for him until his bill is paid."

The lien as thus established, is not strictly like any other lien known to the law, because it may exist although the attorney has not and cannot, in any proper sense, have possession of the judgment recovered. It is a peculiar lien, to be enforced by peculiar methods. It was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained. The lien was never enforced like other liens. If the fund recovered was in possession or under the control of the court, it would not allow the client to obtain it until he had paid his attorney, and in administering the fund it would see that the attorney was protected. If the thing recovered was in a judgment, and notice of the attorney's claim had been given, the court would not allow the judgment to be paid to the prejudice of the attorney.

If paid after such notice in disregard of his rights, the court would, upon motion, set aside a discharge of the judgment and allow the attorney to enforce the judgment by its process so far as was needful for his protection. But after a very careful search we have been unable to find any case where an attorney has been permitted to enforce his lien upon a judgment for his services by an equitable action, or where he has been permitted to follow the proceeds of a judgment after payment of them to his client. His lien is upon the judgment, and the courts will enforce that through the control it has of the judgment and its own records, and by means of its own process which may be employed to enforce the judgment. But after the money recovered has been paid to his client he has no lien upon that, and much less a lien upon property purchased with that money and transferred to another. After such payment, unless he has protected his lien by notice to the judgment-debtor, his lien is forever gone, and he must look to his client alone for his compensation.

As said by Lord ELLENBOROUGH in *Wilson vs. Kymer*, 1 Maule & Sel. 157, and repeated by Senator Verplanck in *McFarland vs. Wheeler*, 26 Wend. 467, "in a case of a lien we should be anxious to tread cautiously and on sure grounds before we extend it beyond

the limits of decided cases." There are not only no decided cases which sanction the maintainance of this action, but the drift of all the authorities is against the plaintiff's contention.

In *Cooper vs. Jenkins*, 33 Beavan, 431, the master of the rolls said: "I have always understood the law to be that a solicitor had an inherent equity to have his costs paid out of any fund recovered by his exertions; and that the court would not part with it until these costs had been paid, except by consent of the solicitor." In *Mercer vs. Graves*, 7 Q. B., L. R. 499, Lord Chief Justice COCKBURN said: "Although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs."

In *Barker vs. St. Quintin, supra*, Baron PARKE said: "The lien which an attorney is said to have on a judgment, which is, perhaps, an incorrect expression, is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt." In *Braden vs. Ward*, 42 N. J. L. 518, it was held that the right of lien for an attorney's costs exists only where he has received money upon the judgment in the cause, or has arrested it *in transitu*, or where the defendant has paid the judgment after receiving notice of the attorney's claim. REED, J., writing the opinion in that case, said: "There is no instance in the practice of the English courts where the right of lien for costs has been enforced, except where the attorney has possession of the money received upon the judgment, or has arrested it in *transitu*, or else the defendant has received notice of the claim of the plaintiff's attorney before settling the judgment."

In *Cowen vs. Boone*, 48 Iowa. 350, it was held that an attorney's lien upon a judgment is waived by his procuring a transfer to his client of land attached in the suit in satisfaction of the judgment. There the client having received the transfer of the land conveyed it to a third person and took back a mortgage for the purchase money. She then assigned the mortgage, and the attorneys, being defendants in a suit to foreclose it, asserted their lien; and it was held that their lien was upon the judgment and did not follow the land when the title was perfected in the client. In *Whittle vs. Newman*, 34 Ga. 377, it was held that after the litigation was ended and the client had possessed himself of the entire fund recovered by the litigation, the court had no power to give relief to

the attorney. In *Horton vs. Champlin*, 12 R. I. 550, 34 Am. Rep. 722, it was held that an attorney's lien originates in the control which the attorney has in his retainer over the judgment, and the process for its enforcement, thus enabling him to collect the judgment and reimburse himself out of the proceeds.

These authorities are all in harmony with the cases which have been decided in this state (*St. Johns vs. Diefendorf*, 12 Wend. 261; *Marshall vs. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *In the Matter of Knapp*, 85 Id. 284); and from them it appears to be clear that when by acquiescence of the attorney the money recovered has been paid to his client, or his client has received property in satisfaction of the judgment, he cannot enforce his lien against such money or property, but must look to his client alone for his compensation. Therefore, when this money, with the plaintiff's consent, was paid to Mrs. Graves, without any agreement that his lien should be transferred to the fund thus paid, or should follow it any further, the lien was lost, and his only remedy then was against her. Before the judgment was paid, the court, upon his application, would have protected his lien by compelling payment to him, or authorizing him to enforce the judgment for his own benefit, so far as it was necessary to secure his compensation. If the defendants had paid the judgment without notice of the attorney's lien, they would have been protected and the attorney could not have enforced his lien upon the moneys paid. If, however, they had paid after receiving notice of the lien, or in fraud of the rights of the plaintiff, the court would have cancelled any satisfaction of the judgment and allowed him to enforce it for his own benefit.

Therefore, in no aspect of this case was the plaintiff in a position to enforce any lien upon this mortgage for the amount of compensation due for the legal services of his intestate. But we need not stop here. If the plaintiff could otherwise have had an enforcable lien against the funds in Mrs. Graves' hands, or against the mortgage in the possession of Mrs. McDonald, the lien was lost by his consent that the money should be paid to Mrs. Graves. He not only consented that the money should be paid to her, but that he would look to her alone for the amount coming to him. This certainly was a distinct and emphatic waiver of any lien he had. He did not reserve any lien upon the fund, or any right to proceed against it. We do not think that it is a reasonable construction of the letters written by him to Mr. Kernan and Mrs. Graves that he

intended the fund should he paid to her subject to his lien, or that he intended in any way to preserve his lien.

After payment with his consent, his lien was effectually destroyed as the lien of a mechanic is who delivers to the general owner an article upon which he has performed labor without any agreement that his lien shall be preserved.

The confidence of the plaintiff in the client appears to have been misplaced and abused. His claim is a very meritorious one, and we have been anxious to find some way to circumvent the efforts, apparently without justification, to defeat it. But we have been unable to find any, and reluctantly reach the conclusion that the judgment should be reversed and a new trial granted.

All concur. Judgment reversed.

(12 FEDERAL REPORTER, 235.)

IN RE WILSON & GREIG, BANKRUPTS.

(United States District Court, Southern District of New York, June, 1882.)

Petition for payment of attorney's fees for which he claimed a lien. He had, as attorney, recovered two judgments for his clients against one Wilson which remained entirely uncollected. He afterwards recovered another judgment against Hine, Phillips and others. His clients having become bankrupts, their assignees employed other attorneys who, by supplementary proceedings, collected these judgments. Petitioner claimed a lien upon them and their proceeds and sought to have the assignee pay him for his services in the Hine-Phillips case out of the proceeds of the judgment against Wilson.

S. B. Hamburger, for claimant.

Blumenstiel & Hirsch, for assignee.

BROWN, D. J. (After stating the facts.) After examination of the numerous authorities on this subject, English and American, I am satisfied that the claim of the petitioner cannot be sustained, and that an attorney has no general lien upon an uncollected judgment for services in other suits but only a particular lien for his costs and compensation in that particular cause.

An attorney's lien, as now generally recognized, is of two kinds. *First*, a general lien resting wholly upon possession, which is a mere right to *retain*, until his whole bill is paid, all papers, deeds, vouchers, etc., in his possession upon which, or in connection with which, he has expended money or given his professional services. This "retaining lien" is a general one for whatever may be due to him; and, though a client may change his attorney at will, if the latter be without fault and willing to proceed in pending causes, none of the papers or vouchers can ordinarily be withdrawn from him except upon payment of his entire bill for professional services. *In re Paschal*, 10 Wall. 483, 493–6; *In re Brown*, 1 N. Y. Leg. Obs. 69; *In re Broomhead*, 5 Dowl. & L. 52; *Blunden vs. Desart*, 2 Dru. & Warr. 423; *Ex parte Nesbitt*, 2 Sch. & Lef. 279; *Ex parte Sterling*, 16 Ves. 258; *Griffiths vs. Griffiths*, 2 Hare, 592; *Ex parte Pemberton*, 18 Ves. 282; *Lord vs. Wormleighton*, 1 Jacob, 580; *Bozon vs. Bolland*, 4 Myl. & C. 354, 356; *Ex parte Yalden*, L. R. 4 Ch. Div. 129; *Colmer vs. Ede*, 40 Law J. (N. S.) Chanc. 185; *Hough vs. Edwards*, 1 Hurl. & N. 171; Cross, Lien, 216; Stokes, Attys' Liens, 28, 38; 2 Kent, *641. This lien, like other mere possessory liens, is, however, purely passive, being a bare right to hold possession till payment.

The articles cannot be sold or parted with without loss of the lien, nor can any active proceedings be taken at law or in equity to procure payment of the debt out of the articles so held. Cross, Lien, 47, 48; *Thames Iron Works vs. Patent Derrick Company*, 1 Johns. & H. 93; *The B. F. Woolsey*, 4 Fed. Rep. 552, 558. The statute of this State, passed May 8, 1869 (Laws 1869, c. 738), which was designed to afford means of realizing payment upon such mere possessory liens, applies only to liens "upon any *chattel* property." Mere choses in action, such as the notes or demands placed in the petitioner's hands for collection, are not "chattel property" (2 Bl. *387; *Ingalls vs. Lord*, 1 Cow. 240; *Ransom vs. Miner*, 3 Sandf. 692), and therefore not within the statute. As this general lien of the attorney upon the notes and demands in suit depended wholly upon possession, and was a mere right of retention, incapable of any active proceedings to enforce payment, it could not be transferred, nor attach to the judgments obtained upon them or to any proceeds thereof, unless such proceeds came into the attorney's possession, which is not the fact in this case.

The second kind of lien which an attorney has is that existing upon a judgment recovered by him, or moneys payable thereon, or

upon some fund in court. This lien, so far as it extends, is not merely a passive lien, but entitles the attorney to take active steps to secure payment. It did not exist at common law.

It is stated by Lord MANSFIELD to be not very ancient. 1 Doug. 104; Stokes, 3. It does not depend upon possession, but upon the favor of the court in protecting attorneys, as its own officers, by taking care, *ex aequo et bono*, that a "party should not run away with the fruits of the cause without satisfying the legal demands of the attorney by whose industry and expense those fruits were obtained." *Read vs. Dupper*, 6 T. R. 361. As this equitable right rests solely upon the compensation due to the attorney for his services, and money expended in procuring the judgment or the fund secured, it is manifest that it cannot upon principle be extended beyond the services and expenses in the suit itself, or in any other proceedings by which the judgment or fund has been recovered, or in the same subject-matter.

The distinction between an attorney's "retaining lien" upon papers in his possession, and his "charging lien" upon a judgment or other fund, is carefully pointed out by the lord chancellor in *Bozon vs. Bolland*, 4 Myl. & C. 354, 359. "The solicitor's claim upon the fund," he says, "has been called transferring the lien from the document to the fund recovered by its production. But there is no transfer; for the lien upon the deed remains as before, though perhaps of no value; and, whereas, the lien upon the deed could never have been actively enforced, the lien upon the fund, if established, would give a title to payment out of it. The active lien upon the fund, if it exists at all, is newly created, and the passive lien upon the deed continues as before. If the doctrine contended for were to prevail, the lien of the solicitor upon the fund realized would in most cases extend to his general professional demand, and not be confined, *as it always is, to the costs in the cause*, for it must very generally happen that the plaintiff's solicitor has in his hands the documents necessary to establish his client's title to the money."

In *Lann vs. Church*, 4 Madd. 207, the vice-chancellor said that he "had not been able to find any case in which it had been held that a solicitor had any lien on the fund recovered in the cause, except for his costs incurred in such cause."

Such is the well-established English practice. *Stevens vs. Weston*, 3 B. & C. 538; *Hodgkinson vs. Kelly*, 1 Hogan, 388; *Hall vs. Laver*, 1 Hare, 571, 577; *Perkins vs. Bradley*, Id. 219, 231; *Lucas vs. Peacock*, 9 Beav. 177; Stokes, Attys.' Liens, 138. The same

principle has been repeatedly affirmed in this country where the English practice of recognizing a lien upon a judgment has been followed.

In *Phillipps vs. Stagg*, 2 Edw. Ch. 108, the vice-chancellor says that "the attorney's lien is not to extend beyond the costs in this action. He cannot claim the amount of other costs due to him in other suits at law."

In *Adams vs. Fox*, 40 Barb. 442, 448, MORGAN, J., says: "This lien is totally different from the lien upon the papers. The lien on the judgment is confined to the costs of the particular suit, and the attorney can actively enforce it. The lien on the papers is merely a right to retain them, and applies to all his bills of costs."

In *St. John vs. Diefendorf*, 12 Wend. 261, the precise question presented in this case was decided adversely to the attorney's lien. Having recovered a judgment, the plaintiff's attorneys there gave notice to the defendant to pay the damages, as well as the costs, to them, on the ground that they had a demand against their client for costs in other suits to an amount equal to the damages. The court say: "The question is whether the attorney has a lien upon his client's money before it comes into his hands to satisfy the demand he has against his client for costs in other suits. * * * An attorney has a lien upon his client's papers, but he has no lien upon anything which belongs to his client until it is in his possession. The costs belong to the attorney. There can be no lien upon what belongs to another without possession." *Pope vs. Armstrong*, 3 Smedes & M. 214; *Cage vs. Wilkinson*, Id. 223; *The Hektograph Co. vs. Fourl*, 11 Fed. Rep. 844.

The petitioner contends that by the law of this state, as established by the court of appeals in the case of the *Bowling Green Savings Bank vs. Todd*, 52 N. Y. 489, affirming 64 Barb. 146, the lien of an attorney for his general balance, which exists upon all papers and vouchers in his possession, is extended equally to any judgments recovered or moneys collectable upon them. In that case a receiver of the plaintiff was appointed after a decree for the foreclosure of a mortgage had been obtained, but before the sale of the premises. The receiver employed Cullen & McGowan, the previous attorneys of the plaintiff, to proceed in the cause, and they afterwards caused the mortgaged premises to be sold and received the proceeds, from which they claimed to deduct not only their bill in that action, but also a bill for professional services due

to them from the plaintiff in other matters preceding the appointment of the receiver, and also a third bill due in McGowan individually for still prior services.

At special term both the last named bills were disallowed. The general term, on appeal, allowed the prior bill of the firm, but disallowed the individual claim of McGowan; and this was affirmed by the court of appeals. The court last named say: "The attorneys of the bank had a lien upon the papers in the foreclosure, not only for the costs and charges in that suit, but for any general balance in other professional business," referring to 3 T. R. 275; 8 East, 362. Neither of those cases, however, sustain the doctrine of a general lien upon a *judgment* beyond the costs in the particular cause.

In the court below, INGRAHAM, J., says (64 Barb. 135): "Most of the cases in which this lien [upon the judgment] is recognized are cases where the claim was for costs of that particular action in which the motion was made. But the rule is equally well settled as to any claim which the attorney has for his services, and attaches as well to the proceeds of a judgment as to the papers on which the judgment was founded." No authorities are cited for this last proposition, nor after much search have I been able to discover any in this country or in England. We have seen that, so far as respects a general lien upon a judgment, or fund in court, the authorities are all to the contrary. Where an attorney has collected money for his client, and no rights of third persons have intervened, through assignment, death, or bankruptcy, he might, doubtless, offset his own general bill. *Patrick vs. Hazen*, 10 Vt. 184.

In the case of the *Bowling Green Savings Bank*, however, the appointment of a receiver before the collection of the moneys prevented any legal right of set off. The moneys were collected by the attorneys upon the employment of, and as the attorneys of, the receiver, as in the case of *Schwartz vs. Schwartz*, 21 Hun, 33, the moneys were collected upon the employment and as the attorneys of the assignee. In neither of these cases does the distinction seem to be noted which has been so long established between a mere "retaining lien" upon the papers in the possession of an attorney, which is general but purely passive, and his "charging lien" upon a judgment or fund recovered, which is limited to services in the cause, but capable of being actively enforced.

Numerous prior decisions of the court of appeals have declared, like the English cases, that an attorney's lien upon a judgment is based upon the equitable consideration that it is by the attorney's labor and skill that the judgment has been recovered; the judgment being within the control of the court, and the parties within its jurisdiction, the court will see that no injustice is done to its own officers.

In *Rooney vs. Second Avenue R. Co.*, 18 N. Y. 373; in *Ely vs. Cooke*, 28 N. Y. 373; in *Dunkin vs. Vandenberg*, 1 Paige, 626, and in many other cases, the attorney has upon this ground been regarded as an equitable assignee of the judgment to the extent of his demands in the cause. Prior to the adoption of the Code of Procedure the extent of this lien was limited to the taxable costs. The Code has made no other change than to extend the lien to any agreed or deserved compensation. *Marshall vs. Meech*, 51 N. Y. 140, 143; *Haight vs. Holcomb*, 7 Abb. Pr. 210; *Ackerman vs. Ackerman*, 14 Abb. Pr. 229.

HARRIS, J., in the case of *Rooney*, above cited, says that the attorney is now "to be regarded as the equitable assignee of the judgment to the extent of his claim for services *in the action*." In the same case, COMSTOCK, J., says: "The attorney is entitled to a lien, as against his client, because his labor and skill contributed to the judgment," * * * and he "has an interest in the judgment either to the amount of those, or for some other amount which he is entitled to claim (by agreement or on the *quantum meruit*) as the measure of his compensation."

In *Marshall vs. Meech*, 51 N. Y. 143, 10 Am. Rep. 572, the court say that the "attorney has a lien for his costs and compensation upon the judgment recovered by him. Such a lien existed before the Code, and is not affected by any provision of the Code. The lien exists, not only to the extent of the costs entered in the judgment, but for any sum which the client agreed his attorney should have as a compensation for his services. To the amount of such lien the attorney is to be deemed an equitable assignee of the judgment."

In *Wright vs. Wright*, 70 N. Y. 100, the court say: "The attorney had a lien for the amount of his costs and *agreed compensation* upon the judgment, and *to that extent* may be regarded as an equitable assignee of the judgment." See, also, *Ward vs. Syme*, 9 How. Pr. 16.

Neither in the decisions nor in the principles announced in any prior cases do I find any warrant for holding that an attorney has

any lien upon an uncollected judgment beyond his compensation in the particular cause.

In the case of *Wolfe vs. Lewis*, 19 How. (U. S.) 280, a case very closely analogous to that of the *Bowling Green Savings Bank*, the attorney had obtained a judgment of foreclosure, but the money due was paid into court without sale. Upon the attorney's claim of a general lien for other services, and an order for payment thereof out of the fund by the court below, the supreme court reversed the order and directed the fund to be paid to the complainants.

In a recent case (*In re Knapp*, 85 N. Y. 284) DANFORTH, J., says: "The lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it," (71 N. Y. 443); thus reaffirming the only ground upon which this lien has ever been put, and which, while it explains the reason for the lien, also necessarily limits it to the services and charges in the same action. In the case last cited the same eminent justice adds: "No new rule was enunciated in *Bowling Green Savings Bank vs. Todd*, 52 N. Y. 489, where it was said that the lien of the attorney attaches to the money recovered or collected upon the judgment."

As the prior rule was undoubtedly that the lien upon the judgment did not extend beyond the costs and compensation in the cause, or in the same subject-matter, and as no new rule was intended to be enunciated in the case of the *Bowling Green Savings Bank*, it must be understood that the court of appeals did not intend in that case to overrule so many express adjudications that where the moneys have not been reduced to the attorney's actual possession, his lien upon the judgment does not extend beyond the amount of compensation due to him in the particular cause, or in the same subject-matter. *In re Paschal*, 10 Wall. 496; *The General Share T. Co. vs. Chapman*, L. R. 1 C. P. Div. 771.

In the present case the petitioner never came into possession of the moneys claimed; they were procured by the services of the other attorneys, by legal proceedings subsequent to the date of the petitioner's claim. These subsequent services were necessary to realize anything upon the judgment, and the subsequent attorneys have their own lien upon the judgment and its proceeds for their subsequent services in the cause; and, upon the doctrine contended for by the petitioner, they might have a conflicting lien for their own general balance, to the full amount collected, if their bill amounted to so much. Were the doctrine to be recognized that

attorneys have a general lien for all their professional services upon each and every uncollected judgment which they might have obtained in behalf of a client, through an indefinite period, very great confusion and inconvenience would be the necessary result. The petitioner's general bill, in this case, exceeded each of the judgments against James Wilson. If one of them only had been collected by the subsequent attorneys, the prior equitable assignment to the petitioner, upon the doctrine contended for, would either have entitled him to the entire proceeds, to the exclusion of the subsequent attorneys who might have had greater equitable claims for their services in obtaining the money upon the judgment, or else would compel a further judicial hearing and determination, as between the former and subsequent attorneys, as to the apportionment of the proceeds between them.

The bill of services which the petitioner now seeks to charge upon the two earlier judgments is, moreover, a bill for obtaining judgments against Hine and Phillips some four months afterwards. How much, if any, of this bill existed in January, 1879, when the judgments against Wilson were recovered, does not appear; and, by the rule that formerly existed, the attorney had no lien, except upon papers in his hands until judgment, or, at least, till a verdict. *Sweet vs. Bartlett,* 4 Sandf. 661; *McCabe vs. Fogg,* 60 How. Pr. 488. This latter bill, as it now stands, could not, therefore, have been a lien upon the prior Wilson judgments when they were entered; and if not a lien then, how could it become so afterwards? Neither principle nor authority can sanction an increase in the amount of a lien upon an uncollected judgment through subsequent services in independent matters. Section 66 of the new Code of Procedure, 1879, which gives an attorney "a lien upon his client's cause of action" from its commencement, refers, I think, to his services and charges in the cause itself, and no more, and does not affect the questions here considered.

The petitioner's claim to a lien upon the judgments against Wilson must therefore be disallowed.

Upon the pending suits, transferred by the petitioner under the agreement, the assignee has collected $144.57. The petitioner had a lien upon these suits and on the papers therein for his general bill, which the agreement has preserved. Those papers were essential to the further prosecution of these suits, and to the recovery of the moneys afterwards collected therein. Upon the authorities above cited (*In re Paschal,* 10 Wall. 483; *In re Broom-*

head, 5 Dowl. & L. 52, etc., *supra*) the court would not have ordered those papers to be transferred by the petitioner except upon payment of his general bill, or some security analogous to that of the agreement made. *Carver's Case*, 7 Nott. & H. 499; *Heslop vs. Metcalfe*, 3 Myl. & C. 183; *Cane vs. Martin*, 2 Beav. 584; *The Hektograph Co. vs. Fourl*, 11 Fed. Rep. 844. By that agreement this lien must be paid "out of the first moneys collected from those suits." I find a balance of $74.55 collected upon these suits not applied to the petitioner's benefit, and he is, therefore, entitled to that amount.

The substitution of attorneys upon the Wilson executions, and the surrender of the notes upon which those judgments were founded, were not necessary, and were of no value in the subsequent collection of those judgments; they were not even clearly embraced in the terms of the agreement between the parties, and, as they were of no beneficial use, the surrender of them cannot now serve as a basis for any claim to a general lien upon the Wilson judgments which did not previously exist.

In *Hodgins vs. Kelly*, 1 Hogan, 388, the court say: "The general lien exists as to the papers and deeds in his (the attorney's) hands, but cannot be extended to the funds in the cause if the plaintiff can obtain payment without his assistance or the use of those papers."

The petitioner may have an order for the payment of $74.55, and his disbursments in this proceeding.

NOTE.—In *Massachusetts & Southern Construction Co. v. Township of Gill's Creek, et al.*, 48 Fed. Rep. 145, Mr. Hart, the petitioner, asserted a claim of service of $5,000 for services in six certain cases in the courts of South Carolina, and $1,000 for services to be rendered in a pending case in the United States court, and sought to subject to his lien certain bonds known as the Gill's Creek bonds which were involved in the latter case, and which had been assigned to one J. H. Albin who had also been of counsel in the cases.

Said the court, SIMONTON, J: "There can be no doubt that from an early period courts have always interfered in securing to attorneys the fruit of their labors, even as against their own clients. *Ex parte Bush*, 7 Vin. Abr. 74. This is an equitable interference on the part of the court, (*Barker vs. St. Quintin*, 12 Mees. & W. 441), — the enforcement of a claim or right on the part of the attorney to ask the intervention of the court for his own protection, when he finds that there is a probability that his client may deprive him of his costs, (*Mercer vs. Graves*, L. R. 7 Q. B. 499). See in full. *In re Knapp*, 85 N. Y. 285. For the want of a better word, it is called a "lien," but this so-called "lien" is limited to the funds collected in the particular case in which the services were rendered. *In re Wilson*, 12

Fed. Rep. 235. This is the rule followed by all courts, without requiring the sanction of a statute. In England until the statute of 18 Victoria the lien of an attorney was confined to the taxed costs and his disbursements. In South Carolina there is no provision by statute on the subject, and that rule of the English court is followed strictly. *Scharlock vs. Oland*, 1 Rich. Law, 207; *Miller vs. Newell*, 20 S. C. 123, 128. The courts of the United States seem to protect attorneys in their fees as well as in their taxed costs. In *Wylie vs. Coxe*, 15 How. 415, the court protected an attorney by securing him the percentage contracted to be paid him on recovery. In *Cowdrey vs. Railroad Co.*, 93 U. S. 354, an attorney was secured the fee he had expressly contracted for. So, also, in *McPherson vs. Cox*, 96 U. S. 404. These were express contracts. As this protection to the attorney is founded upon the idea "of a contract implied by law," and as effectual as if it had resulted from an express agreement, (*Ex parte Bush, supra*; *Cowell vs. Simpson*, 16 Ves. 279) and as the statutes of the United States expressly recognize the right of attorneys to charge their clients reasonable compensation for their services, in addition to taxable costs, (Rev. St. U. S. § 823) it would seem that the United States courts will also protect the implied contract.

The petitioner's claim is upon a fund arising under a judgment in this court for services rendered in the State courts and in this court—a right arising under contract. *Cowell vs. Simpson, supra.* As the law of South Carolina confines such a lien to costs and disbursements, it is clear that the counsel fee could not have entered into the contract of service in the State court, even if the recovery were had there. This protection of attorneys, in the absence of a statute, is given by each court to its own officers. This court would not—perhaps I should say could not—extend the protection to services rendered in another wholly distinct jurisdiction. There is another consideration. There were eight separate suits and seven separate recoveries. All the bonds recovered in six suits have been removed from the control of the court. It is true that there was one question, common to all of the suits; but they were argued together simply for the sake of convenience.

If, as we have seen, the protection is given to an attorney as against a particular fund, for his services in the suit gaining that fund, and that only, how can we fix on the Gill's Creek bonds the claim for services rendered to the other bonds? This would be a general lien. See Jones, Liens, § 194, and cases quoted. How can we tell what part of the $5,000 is to be allotted to the Gill's Creek bonds? Of course, as the protection is for services rendered, there can be no lien for $1,000, a prospective charge for services to be rendered. But the assignment to J. H. Albin disposes of the matter. He, with the petitioner and Messrs. Lord & Hyde, were all engaged on the same side in the same case. If the petitioner has a right to the protection of the court, so, equally, has each one of them, and in each of them the right is equitable. *Barker vs. St. Quintin, supra.* But with this equity Mr. Albin has, so to speak, the legal title. When the equities are equal, the law will prevail. He cannot be disturbed in his right of possession. * * * Petition dismissed."

In *Dicas vs. Stockley*, 7 Carr. & P. 587, it is held that the town agent of an attorney has a lien upon the money received in the particular cause, and upon the papers in the particular cause, for the amount due him by the

attorney for the agency bill in that particular cause only, and he has this lien against all the world. If he has had no payment made to him specifically on account of this cause, he is entitled to this lien until his agency bill in the particular cause is satisfied. If the agent has parted with the possession of the papers by his own act, though by mistake, his lien is at an end; but if the papers were unlawfully taken out of his possession, his lien continues, and he may bring trover for them.

(73 MICHIGAN, 256.)

WEEKS vs. WAYNE CIRCUIT JUDGES.

(Supreme Court of Michigan, January, 1889.)

Relators apply for a mandamus requiring respondents to vacate an order discharging a suit and setting aside the judgment taken therein. The facts are stated in the opinion.

Edwin F. Conely, for relators.

C. P. Black, for respondents.

PER CURIAM. The relators were attorneys for George W. Ayres, who obtained a judgment of $2,500 against the Detroit Free Press Company in an action for libel which they prosecuted for Ayres in the Wayne circuit court.

Ayres was poor and when he commenced his suit and retained his attorneys he made an agreement with them by which they were to be paid a reasonable compensation for their services and disbursements made in prosecuting the suit from the proceeds of the judgment which should be obtained, and it is stated in the affidavits of the relators that this arrangement was known to the defendant, and which is not denied in any affidavit on the part of defendant accompanying the return of respondents.

It is further shown that the defendant in the libel suit, without the knowledge of the attorneys for either party, and without the consent of relators, or they having received their pay for their services and disbursements in said suit, settled said suit with the plaintiff, and obtained his receipt in full for said judgment, and upon settlement took the order of the court setting aside said judgment, and dismissing the plaintiff's case.

Relators now move for a *mandamus* requiring respondents to vacate said order discharging said suit and that the order setting

aside said judgment be modified in such manner as to secure the rights and interests of relators therein under their said agreement with the plaintiff in said suit.

Held, that the relators are entitled to have the relief they ask against the action taken by the circuit judge in the premises, and that the order entered should be modified as prayed in the petition; that the arrangement made by relators with Ayres to be reimbursed for moneys advanced by them, and for pay for their services in prosecuting the suit, from the proceeds of the judgment which should be obtained in the case, operated as an assignment of the judgment to relators to the extent of those claims, and until they had received their pay the plaintiff could give no valid discharge of the judgment. *Kinney vs. Tabor,* 62 Mich. 517; *Potter vs. Hunt,* 68 Id. 242; *Wells vs. Elsam,* 40 Id. 218; *Andrews vs. Morse,* 12 Conn. 444, 31 Amer. Dec. 752 and notes; Weeks, Attys. § 309; *Hutchinson vs. Howard,* 15 Vt. 544.

That it is true courts as a rule look with favor upon a compromise and settlement made by the parties to a suit with the consent of all persons concerned, to prevent the vexation and expense of further litigation; but the rule only applies where the rights and interests of all the parties concerned, both legal and equitable, have all been respected, and in good faith observed. Parties cannot assume that attorneys have no rights, without inquiry.

The present does not disclose such a case, and the writ prayed for must be granted.

CHAPTER II.

OF AUCTIONEERS.

I.

AUCTIONEER'S POWERS.

(28 NEW YORK, 261, 84 AM. DEC. 343.)

BUSH vs. COLE.

(New York Court of Appeals, September, 1863.)

Action against auctioneers for damages for failure to obtain title to a house and lot in the city of Brooklyn, which defendants, as auctioneers, sold to him at public auction. The sum which the plaintiff bid, and on which the premises were knocked down to him, it is claimed by defendants was a less sum than that for which they were authorized to sell the premises. The remaining facts appear in the opinion.

James L. Campbell, for the appellants.

John H. Reynolds, for the respondent.

By Court, BALCOM, J. Whether the verdict of the jury was against evidence, is not within the province of this court to determine. We must therefore assume the truth of the case to be as the jury have found, namely, that the defendants were not authorized to sell the house and lot for less than two thousand eight hundred dollars. This being the case, their alleged contract, as auctioneers, to sell the same to the plaintiff for $2,250 was not binding upon the owner. The defendants were constituted agents for a particular purpose and under a limited and circumscribed power, and could not bind their principal beyond their authority; See *Batty vs. Carswell*, 2 Johns. 48; *Andrews vs. Kneeland*, 6 Cow. 354; *Gibson vs. Colt*, 7 Johns. 390; *Nixon vs. Palmer*, 8 N. Y. 398; *Mortimer vs. Cornwell*, Hoff. Ch. 351; Story on Agency, Secs. 17–23, 126, 131, 224.

If the owner of the premises had authorized the defendants to

sell the same at auction, without any limitation as to the price, the contract of sale which the defendants executed would have bound him. It would have answered the requirements of the statute of frauds; and according to the uniform course of decisions in this State, the defendants are personally bound by the contract. It does not show who the owner of the premises was. But if it did, the defendants would be personally liable upon it, because the owner did not authorize them to make such a contract in his name or for him. See *White vs. Skinner*, 13 Johns. 307, 7 Am. Dec. 381; *Brown vs. Feeter*, 7 Wend. 305; *Commercial Bank vs. Norton*, I Hill, 502; *Coleman vs. Garrigues*, 18 Barb, 60. It was not so framed and executed that neither the defendants nor their alleged principal could be bound by it, as the agreement was in *Sherman vs. N. Y Cent. R. R. Co.*, 22 Id. 239. It shows that the defendants signed it as agents of an undisclosed principal; and as they did so without authority, they were primarily responsible as contracting parties. *Episcopal Church of St. Peter vs. Varian*, 28 Id. 644; *Mills vs. Hunt*, 20 Wend. 431.

If these views are correct, there can be no doubt that the defendants were liable to refund to the plaintiff the $222.50 percentage on his bid, and the $10 auctioneers' fees which they received of him when the contract of sale was made, with interest on the same, and if we are to assume that the verdict of the jury establishes that the defendants knew they were not authorized to sell the premises for less than $2,800, when they struck them off to the plaintiff for $2,250, he was also entitled to recover what the premises were worth over and above the price he was to pay therefor; for this proposition is clearly sustained by the decisions in *Trull vs. Granger*, 8 N. Y. 115; *Driggs vs. Dwight*, 17 Wend. 71, 31 Am. Dec. 283; and *Brinckerhoff vs. Phelps*, 24 Barb. 100; and neither of these decisions was overruled by this court in *Conger vs. Weaver*, 20 N. Y. 140. The rule seems to be, that if the vendor acts in good faith, and as a prudent man should, the vendee can recover nothing for the loss of a good bargain. *Peters vs. McKeon*, 4 Denio, 546. But if he contracts to sell lands to which he has no color of title, or perversely refuses to perform his contract, when there is no obstacle in the way, or makes an agreement to sell as agent, without authority from the owner, he is liable for damages beyond the part of the consideration paid and interest. See *Baldwin vs. Munn*, 2 Wend. 399, 20 Am. Dec. 627; *Kelly vs.*

Dutch Church, 2 Hill, 116; *King vs. Brown*, 2 Id. 488 and authorities *supra*.

We must assume that the verdict of the jury shows the defendants did not act in good faith, because the jury found specifically that the owner limited the price for which the premises might be sold, and that such limitation was made known to the defendants,—which price was greater than that for which they struck off the premises to the plaintiff.

The motion for a non-suit was properly denied for two reasons: 1. The plaintiff was clearly entitled to recover the percentage and auctioneer's fees which he paid to the defendants, and interest thereon; 2. The evidence raised the question whether the defendants did not act in bad faith, in agreeing to sell the premises for less than the price limited therefor by the owner. The evidence that the premises were worth more than the price the plaintiff was to pay therefor was competent, if in any view of the case the plaintiff could recover for the loss of a good bargain and as there was sufficient evidence to justify the judge in submitting the question to the jury, whether the defendants did not act in bad faith in selling the premises to the plaintiff for a less sum than they were authorized to take therefor, the evidence that the premises were worth more than the contract price, was admissible.

The charge on the question of damages is not in the case, and the presumption is, it was correct.

My conclusion is that no error was committed on the trial, unless the verdict was against the evidence. But whether it was is not for us to determine. The decision of the Supreme Court that it was not against evidence is conclusive upon the defendants.

It follows that the judgment of the supreme court should be affirmed with costs. DENIO, C. J., delivered an opinion for affirmance. All the judges concurred.

Judgment affirmed.

NOTE.—See, also, *Kroeger vs. Pitcairn*, *ante*, 501; *Simmons vs. More*, 505; *Patterson vs. Lippincott*, 507; *Peters vs. Farnsworth*, 887.

(101 MASSACHUSETTS 291, 3 AM. REP. 353.)

THOMPSON vs. KELLY.

(Supreme Judicial Court of Massachusetts, March, 1869.)

Action by plaintiffs, who were auctioneers, to recover the sum of $200, alleged to be due them from defendant because of his failure to complete the purchase of property struck off to him by plaintiff.

A house fitted only with cold water was advertised by plaintiff for sale at auction as fitted with "hot and cold water," and subject to examination at any time before sale. The mistake was announced by the auctioneer at the opening of the sale. The property was sold to Kelly, who had read the advertisement, but had not examined the house nor heard the announcement as to the mistake. He signed the agreement to comply with the terms of sale, one of which was that the purchaser should pay the auctioneer $200 to bind the bargain, and forfeit that amount if he failed to comply with the terms. At the head of this agreement was the advertisement with the words "hot and" erased. On examining the house and finding no hot water fixtures, Kelly refused to complete the sale or pay the $200.

C. R. Train, for plaintiffs.

L. Child & L. M. Child, for defendant.

WELLS, J. The report does not state what questions were intended to be presented to this court. The defendant was clearly entitled to go to the jury upon the testimony. But he makes no point in the argument here, that he was wrongfully deprived of that right. We assume, therefore, that the verdict was ordered for the plaintiffs with his assent; and that he did not desire to argue to the jury upon the force of the testimony.

We cannot undertake to decide questions of fact. We can only take the testimony as reported, giving it full effect so far as uncontradicted, and, in all points of disagreement, assuming that of the defendant to be true; and if, upon the testimony so considered, there appears to be a *prima facie* case for the plaintiffs to which there is no legal defense shown, the verdict must stand.

No question is made upon the pleadings. The two principal questions presented for our consideration are: 1st. Whether the action can be maintained in the names of the plaintiffs. 2d.

Whether the mistake, under which the defendant signed the memorandum of sale, was such as entitled him to repudiate the purchase.

1. In case of personal property, an auctioneer, employed to sell, may ordinarily maintain an action for the price, or for the property itself. Chit. Con. (10th Am. ed.) 252; 1 Chit. Pl. (6th ed.) 7, 8; Story on Agency, §§ 27, 107, 397; *Tyler vs. Freeman*, 3 Cush. 261. This doctrine stands upon the right of the auctioneer to receive, and his responsibility to his principal for, the price of the property sold, and his lien thereon for his commissions; which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds. In case of real estate, he can have no such special property, and would not ordinarily be held entitled to receive the price. But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase-money, may become necessary.

In this case, if there was an effectual sale, the amount of the deposit due, by its terms, not having been paid at the time, there is an implied promise to pay it. That promise inures to the benefit of the party legally entitled to receive the deposit. It is not merged in the written agreement, because that writing clearly excludes it as a matter already otherwise provided for. There is also a subsequent express promise to pay the amount, coupled only with the condition "if the house is all right." The defendant does not deny that the house was "all right," except in the particular upon which he seeks to defeat the entire sale.

The memorandum is sufficient to take the case out of the statute of frauds.

The plaintiffs, it is true, are not parties to the written instrument. But they do not sue, and it is not necessary that they should sue, upon the writing. The obligations in relation to the deposit are outside of that, and are so recognized by the writing itself.

2. The mistake for which the defendant seeks to avoid the contract of sale, was not occasioned by any fault of the plaintiffs. It

did not affect the identity of the property which was the subject of the sale. The error in the advertisement does not appear to have been otherwise than in good faith, and was corrected and explained when the property was offered for bids. The defendant, without previously examining the property, and not having been present at the opening of the sale, when statements and explanations in relation to the property offered might reasonably be expected to be made, took no precaution to inquire, but relied wholly upon the published advertisements. He contented himself with reading a part only of the memorandum which was placed before him for signature, and which exhibited the modification in the description of the property, by an erasure of "hot and" from the printed advertisement attached. It does not appear that the plaintiffs, or Garrett, in any way conducted so as to mislead him, or induce him to forego scrutiny or inquiry; nor that either of them knew, or had reason to suppose, that he was thus misled, or that he was not present when the alteration of the advertisement was explained. Upon his own statement, we do not think he makes such a case of mistake as entitles him to be released from his contract.

Judgment on the verdict.

NOTE.—See, also, as to agents' right to sue: *Rowe vs. Rand, ante*, p. 257; *Rhoades vs. Blackston, ante*, p. 564.

(2 RICHARDSON'S LAW, 464.)

BOINEST vs. LEIGNEZ.

(South Carolina Court of Appeals, October, 1845.)

Action of assumpsit to recover damages upon the re-sale of certain chattels originally purchased by defendant from the plaintiff at an auction sale, and which had been re-sold at a loss. Defense, among other things, that before payment of the price defendant had tendered back the chattels to the auctioneer and rescinded the sale. Verdict for plaintiff and defendant appealed and moved for a new trial.

Kunhardt, for motion.

Porter, contra.

FROST, J. (After disposing of the first ground of appeal.) The

second ground affirms that the auctioneer may rescind a contract of sale made through his agency; or at least, that he may, before the sale is completed by the payment of the purchase money. Even the more limited alternative presented in this ground, cannot be maintained. An auctioneer is an agent to effect a sale. As soon as the sale is effected, his agency ceases. If he has pursued his instructions, he is in no manner liable for the execution of the contract, and can neither add to, nor take from, the terms and conditions the principal has prescribed. His intervention was only employed to make the sale, and is withdrawn as soon as that is done, and the rest is left to the parties. In *Nelson vs. Albridge*, 2 Stark, N. P. 435. 3 Eng. C. L. R. 419, an auctioneer had sold a horse of the plaintiffs, and took him back from the purchaser without payment of the deposit, on his complaint that the horse did not answer the description in the advertisement. For this, the auctioneer was held liable. BEST, C. J., said: "It was the duty of the auctioneer to sell, and not to rescind, to do and not to undo; and the law would imply a contract, on his part, to discharge his duty;" and the plaintiff had a verdict. * * *

Motion denied.

II.

AUCTIONEER'S LIABILITY.

(68 MARYLAND, 229, 6 AM. ST. REP. 437.)

HIGGINS vs. LODGE.

(Court of Appeals of Maryland, October, 1887.)

Replevin. The opinion states the case.

Charles W. Field, Jr., for the appellant.

William Reynolds, for the appellees.

BRYAN, J. Lodge and others replevied certain goods from Higgins. The evidence tended to show that one Hirsch Levy had made a fraudulent purchase of these goods from the plaintiffs and that he had sent them for public sale to the defendant, who was an auctioneer. The defendant had made advances of money on them.

On the supposition that the purchase of the goods from the plaintiffs had been accomplished by the fraud of Levy, it is not questioned that it was void at the election of the sellers, and that they could have reclaimed their property from him. But if he sold them to a *bona fide* purchaser without notice of the fraud, a good title would be passed which could not be impeached by the original vendor. Ordinarily a purchaser cannot acquire a title from a vendor who has none.

But the authorities show, without dissent, that there is no exception under the circumstances which we have just supposed. In *Powel vs. Bradlee*, 9 Gill & J. 278, it is said: "In such a case good faith and a valuable consideration would be essential constituents of a good title." If these features do not appear in the transaction, we take it that the title fails. An interest in the goods, acquired by making advances on them when placed in the hands of an auctioneer for sale, would be protected under the same circumstances which would make a purchase valid.

The court instructed the jury that if Levy's purchase was fraudulent, the defendant's title would be defeated, unless they found he had in good faith advanced money to Levy upon the security of the goods, or incurred expenses in relation to them. On the prayer of the defendant, the court ruled that the plaintiff could not recover, if the jury found that the advances were made by the defendant without notice or knowledge of the circumstances under which Levy purchased the goods.

On the prayer of the plaintiffs, it was ruled that they were not precluded from recovering by these advances, if the jury found that at the time the goods were delivered to the defendant, he had knowledge of circumstances calculated to put a man of ordinary prudence on inquiry as to whether Levy was perpetrating a fraud in selling the goods by auction, and that he failed to make inquiry into the character of the transaction. Taking these instructions together, it seems to us that they laid the case properly before the jury. Higgins could not deduce title to the goods through a fraudulent vendee unless he showed that his advances were made in good faith. If he knew that Levy was selling these goods for the purpose of carrying into effect a fraud, his advances could not be considered as made in good faith; and if the circumstances were such as reasonably to call for inquiry, and if inquiry would

have given him this knowledge, he is responsible in the same way as if he had obtained it.

It has been held that if in any purchase "there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him." *Baynard vs. Norris*, 5 Gill, 483, 46 Am. Dec. 647. To the same effect are *Green vs. Early*, 39 Md. 229; *Abrams vs. Sheehan*, 40 Id. 446.

The evidence showed that Levy rented a basement-room about the 15th of June, 1885, and commenced business as a jobber; that between that time and September 7th he purchased a large quantity of goods—six thousand dollars' worth being purchased from these plaintiffs; that in the latter part of June, 1885, he commenced sending goods to the defendant to be sold by auction, the defendant making advances on them; that he continued to send goods for this purpose, and to receive advances from the defendant until September 5th; that the amount of these auction sales was more than six thousand four hundred dollars; that on September 5th Levy had in his store only four or five hundred dollars' worth of goods; that the week before he had fifteen thousand dollars' worth; that he had opened a bank account on the 11th of July, and on the 7th of September he drew out the balance to his credit, with the exception of a small sum; that after that day he was regarded as utterly insolvent; that he purchased the goods in question from the plaintiffs on the 21st of August on credit, the time fixed for payment being October 10th; that the small balance to his credit in the bank was attached by creditors, and that after September his business was conducted in his wife's name.

The evidence certainly warranted the jury in finding that when Levy purchased these goods he did not intend to pay for them, and that he was engaged in a deliberate scheme of fraud, which he was effecting by purchasing large quantities of goods on credit, selling them by auction and putting the proceeds beyond the reach of his creditors. Notwithstanding fraud on the part of Levy in making the purchase in question in this case, the title of Higgins would be good if the matters within his knowledge did not reasonably suggest to him the propriety of enquiring into the transactions in which Levy was engaged, and if this enquiry would not have dis-

covered his fraudulent course. It was the province of the jury to determine this question on the evidence in the cause.

Judgment affirmed.

NOTE.—In *Lewis vs. Mason*, (1887) 94 Mo. 551, Levy had made a transfer of goods to one Landecker which was alleged to be in fraud of creditors. Landecker consigned them for sale to plaintiff who advanced money upon them without notice of the fraud. While in his hands they were attached by creditors of Levy. Said the court, "under this state of facts, plaintiff had a right to the possession of the goods as against an attaching creditor; of which possession he could not be deprived either by the consignor or creditors of the consignor till his advances, commissions and charges were tendered him, and he was made whole. The principle here stated is supported by the following authorities; *Baugh vs. Kilpatrick*, 54 Pa. St. 84; *Montieth vs. Printing Co.*, 16 Mo. App. 450; Drake on Attach. pp. 204–5, § 245; Jones on Pledges, § 372; Story on Agency, § 27." See, also, *Stephens vs. Elwall, ante*, p. 226, and note.

(LAW REPORTS, 8 QUEEN'S BENCH, 286.)

HARRIS vs. NICKERSON.

(English Court of Queen's Bench, April, 1873.)

The defendant, an auctioneer, advertised in the London papers that certain brewing materials, plant and office furniture would be sold by him at Bury St. Edmunds on a certain day and two following days. The plaintiff a commission broker in London, having a commission to buy the office furniture, went down to the sale; on the third day, on which the furniture was advertised for sale, all the lots of furniture were withdrawn. Upon which the plaintiff brought an action against the defendant to recover for his loss of time and expenses:—

On these facts the judge gave judgment for the plaintiff, but at the request of the defendant, gave him leave to appeal.

If the court was of opinion that the plaintiff was not entitled to recover, the judgment was to be set aside and a non-suit entered.

Macrae Moir, for the defendant, contended that it was clear that the mere advertising of a sale did not amount to a contract with anybody who attended the sale, that any particular lot, or class of articles advertised, would be put up for sale. He referred to *Warlow vs. Harrison*, 1 E. & E. 295, 309, 28 L. J. Queens B. 18, 29 Id. 14, and *Payne vs. Cave*, 3 Term Rep. 148.

(QUAIN, J., referred to *Mainprice vs. Westley*, 6 B. S. 420, 34 L. J. Q. B. 229.)

Warton, for the plaintiff, contended that the advertisement of the sale by the defendant was a contract by him with the plaintiff, who attended the sale on the faith of it, that he would sell the property advertised according to the conditions; and the withdrawal of the property after the plaintiff had incurred expenses in consequence of the advertisement was a breach of such contract. A reasonable notice of the withdrawal, at all events, ought to have been given. He likened the case to that of an advertisement of a reward, which, though general in its inception, becomes a promise to the particular person who acts upon it before it has been withdrawn. *Williams vs. Carwardine*, 4 B. & Ad. 621. He referred to *Spencer vs. Harding*, L. Rep. 5 C. P. 561. *Macrae Moir* was not heard in reply.

BLACKBURN, J. I am of opinion that the judge was wrong. The facts were that the defendant advertised *bona fide* that certain things would be sold by auction on the days named, and on the third day a certain class of things, viz., office furniture, without any previous notice of their withdrawal, were not put up. The plaintiff says, inasmuch as I confided in the defendant's advertisement, and came down to the auction to buy the furniture (which it is found as a fact he was commissioned to buy) and have had no opportunity of buying, I am entitled to recover damages from the defendant, on the ground that the advertisement amounted to a contract by the defendant with anybody that should act upon it, that all the things advertised would be actually put up for sale, and that he would have an opportunity of bidding for them and buying. This is certainly a startling proposition, and would be excessively inconvenient if carried out. It amounts to saying that any one who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or traveling expenses.

As to the cases cited: in the case of *Warlow vs. Harrison* 1 E. & E. at pp. 314, 318, 29 L. J. Q. B. 14, the opinion of the majority of the judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest *bona fide* bidder when the sale was advertised as without reserve; in such a case it may be that there is a contract to sell to the highest bidder, and that if the owner bids there is a breach of the contract; there is very plausible ground at all events for saying,

as the minority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case, unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, or be liable to an action, we cannot hold the defendant liable.

QUAIN, and ARCHIBALD, JJ., delivered concurring opinions.

IV.

AUCTIONEER'S LIEN.

(LAW REPORTS, 30 CHANCERY DIVISION, 192.)

WEBB vs. SMITH.

(English Court of Appeal, January, 1885.)

Plaintiff was a creditor of one Canning, for whom the defendants, as auctioneers, had sold both real and personal property. Canning directed defendants to pay plaintiff from the proceeds of the real estate which was a brewery. Defendants wrote to plaintiff, saying: "We are in receipt of Mr. Canning's letter requesting us to pay you the sum of £503, and we hope the settlement will shortly be made, when we shall have much pleasure in complying with his instructions, if we have sufficient in hand to enable us to do so. You will understand that we only hold the deposit, and therefore are unable to say exactly what sum we shall have in hand at the settlement." Plaintiff did not reply to this. Afterwards Canning revoked the authority to pay plaintiff, saying he would pay it himself, and defendants thereupon paid Canning the balance in their hands, having first paid out of the fund produced from the sale of the real estate certain charges which they had incurred in reference to it, and also deducting and setting off what Canning owed them for advances and services. In an action by plaintiff to charge defendants it was held that they were not entitled to deduct their charges from the real estate fund. Defendants appealed.

Hemming, Q. C., and *Shebbeare*, for appellants.

Marten, Q. C., and *Hadley*, for appellees.

LINDLEY, L. J. This case is of considerable importance: it is an experiment tried for the first time. The action is brought against the auctioneers, who have sold a brewery for a customer. The plaintiff relies upon an equitable assignment to him by Canning, and the first question is, what are the plaintiff's rights under the equitable assignment? The vice-chancellor seems to have considered that the letter of the defendants prevented them from exercising any rights which they might have. The terms of that letter have been fully commented upon, and it is plain that the defendants did not intend to exclude themselves from any rights which they might have. It seems to me that this disposes of the point decided in the plaintiff's favor. It has been contended that auctioneers have no lien, but they have a particular lien although not a general lien; it is so laid down in all the books and in *Robinson vs. Rutter*, 4 E. & B. 954, and as to the question of set-off this case is covered by *Roxburghe vs. Cox*, 17 Ch. D. 520. So far as to the balance of the fund produced by the sale of the brewery, the law is clear.

But then the plaintiff Webb, relies upon another point, namely, as to marshalling, and as to this the action is an experiment. The plaintiff Webb had a right of action and also a charge upon the fund in the defendants' hands, but the defendants had many rights: they had a right of lien and also they had a right of set-off. It is argued for the plaintiff Webb that the defendants were bound to obtain payment out of the fund produced by the sale of the furniture, so that he might obtain payment out of the fund produced by the sale of the brewery. Now, I will suppose that the defendants had no fund upon which they could rely by way of set-off.

There is a case which I will mention where the matter is treated of: it refers to the jurisdiction of the Court of Admiralty, and is called "*The Arab*," 5 Jur. (N. S.) 417. In that case the holder of a bottomry bond tried to compel the crew of a ship to waive their right of maritime lien for wages for services rendered, and to sue the owners, who were perfectly solvent. The holder of the bottomry bond had only a remedy against the ship: whereas the crew had also a personal remedy by action of debt against the owners. The judge of the Court of Admiralty held that he had no jurisdiction to restrain the proceedings of the crew against the ship, and to compel them to resort to a personal remedy against the ship own-

ers: and the reason given is that there were not two funds under the control of the court. In the present case, I think that we are compelled to lay aside the suggestion that the defendants are bound to give up their security and to sue Canning for the money due to them, or at least to retain the sum due to them out of the fund produced by the sale of the furniture. Such a suggestion is founded on a mistake. It is not warranted by *Aldrich vs. Cooper,* 8 Ves. 382, or by any case decided before Lord HARDWICKE. But a principle has been laid down, which has found its way into the text-books, and it is that assets shall not be marshalled where by so doing another man's right would be prejudiced; in this case if the doctrine of marshalling were applied, we should prejudice the right of the defendants as to their lien.

The general principle of marshalling was stated by Sir WILLIAM GRANT, M. R., in *Trimmer vs. Bayne,* 9 Ves. 209, 211, in the words that "a person having resort to two funds shall not by his choice disappoint another, having one only." That appears to be a correct statement of the law. The vice of the argument for the plaintiff is that in truth there were not two funds to which the defendants could resort; that is, two funds standing upon an equal footing. The defendants had a superior right of lien as to the fund produced by the sale of the brewery. I think, however, that they could not have deprived the plaintiff of the benefit of his charge, if there had been two funds to which they might have resorted under equal circumstances. The appeal of the defendants must be allowed.

BRETT, M. R., and COTTON, L. J., delivered concurring opinions.

CHAPTER III.

OF BROKERS.

Who is a broker:
Sibbald vs. Bethlehem Iron Co., *ante*, p. 301.

When is deemed to have completed his undertaking:
Sibbald vs Bethlehem Iron Co., *ante*, p. 301.

Wrongful discharge of:
Sibbald vs. Bethlehem Iron Co., *ante*, p. 301

Commissions of:
Sibbald vs. Bethlehem Iron Co., *ante*, p. 301.

Commissions of—Continued:
Rice vs. Wood, *ante*, p. 12.
Bell vs. McConnell, *ante*, p. 538.

Acting for both parties:
Rice vs. Wood, *ante*, p. 12.
Bell vs. McConnell, *ante*, p. 538.
Vinton vs. Baldwin, post, p. 664.

Employment of two or more:
Ahern vs. Baker, *ante*, p. 288.

Liability for acting without authority:
Simmons vs. More, *ante*, p. 505.

(88 INDIANA, 104, 45 AM. REP. 447.)

VINTON vs. BALDWIN.

(Supreme Court of Indiana, November, 1882.)

Action for commission. The opinion states the case. The defendant had judgment below.

S. C. Willson and *L. B. Willson*, for appellant.

ELLIOTT, J. On the 5th day of June, 1879, the appellee executed a written agreement appointing appellant his agent to procure a loan, and promising to pay him "for his services five per cent. commission on the amount of the loan obtained." Formal application was made for a loan, the parties to whom it was made agreed to lend the money applied for, the appellant notified appellee that his proposition for a loan had been accepted, and gave him a form of mortgage to execute; the paper was taken by the appellee, who promised to cause it to be duly signed and acknowledged. The day following the appellant notified the

appellee that he had the money ready for him, but the latter refused to accept it, and declined to take the loan. The facts are not in dispute, and the only question is whether the court correctly applied the law to them. We are clear that the court erred.

A broker who is employed to procure a loan is entitled to his commission when he procures a lender ready, willing and able to lend the money upon the terms proposed. His right to commission does not depend upon the contingency of the applicant's acceptance of the loan, but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing. In *Green vs. Lucas,* 33 L. T. (N. S.) 584, Lord CAIRNS said, in a case very similar to the present: "It appears to me that plaintiff had done everything which agents in this kind of work were bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contracts afterward were to go off from the caprice of the lender, or from the infirmity in the title, it would be immaterial to the plaintiffs." *Green vs. Reed,* 3 F. & F. 226; *Green vs. Lucas,* 31 L. T. (N. S.) 731. In principle the case of a broker negotiating a loan is the same as that of a broker negotiating a sale of property, and in the latter case it is uniformly held that the commissions are earned when a purchaser is found able and willing to buy on the terms proposed. In such cases the broker's right to compensation is held to accrue when he has furnished a purchaser, and does not depend upon the ultimate consummation of the sale. *Lane vs. Albright,* 49 Ind. 275; *Love vs. Miller,* 53 Id. 294, s. c. 21 Am. Rep. 192; *Reyman vs. Mosher,* 71 Ind. 596; *Moses vs. Bierling,* 31 N. Y. 462; *Mooney vs. Elder,* 56 Id. 238; *Hart vs. Hoffman,* 44 How. Pr. 168; *Pricket vs. Badger,* 1 C. B. (N. S.) 296.

A real estate or loan broker may recover commissions, although he acts for both parties; but it must appear that he acted openly and fairly, and that all the facts were known to both principals. A broker is regarded as a middleman, and not as an agent in whom peculiar trust and confidence are placed. *Alexander vs. Northwestern, etc., University,* 57 Ind. 466; *Rowe vs. Stevens,* 53 N. Y. 621; *Rupp vs. Sampson,* 16 Gray, 398; *Redfield vs. Tegg,* 38 N. Y. 212; *Barry vs. Schmidt,* 57 Wis. 172, 46 Am. Rep. 35. See *Bell vs. McConnell,* 37 Ohio St. 396, 41 Am. Rep. 528 (*ante,* p. 538).

We have had no brief from the appellee, and our unaided efforts

have not furnished us with any reason upon which the finding can be sustained.

Judgment reversed.

(42 KANSAS, 664, 16 AM. ST. REP. 512.)

PLANT vs. THOMPSON.

(Supreme Court of Kansas, July, 1889.)

Action by Miller and Thompson against Plant and wife for commissions on the sale of real estate placed in their hands for sale, and which the Plants had sold to one Kellam. Judgment for plaintiff below.

G. N. Elliott, for plaintiffs in error.

Hazen & Isenhart, for defendant in error.

HOLT, C. (After disposing of a point of practice.) The defendants claim that there was error in giving and refusing instructions, and that the verdict is contrary to the evidence. There is really but little conflict in the evidence brought before us. Taking even the uncontradicted testimony, we believe the judgment is correct, and without following specifically the objections of defendants, we will give our reasons for affirming it.

From the testimony of Mrs. Plant, it appears that her attention was first called to Kellam as a possible purchaser by the plaintiffs. To be sure, they entered into no negotiations with him for a sale, and it was sold for a less price than that given the agents. It was also sold by her without any aid from the plaintiffs, except that her attention was directed to Kellam by them. This view of the case is as favorable to the defendants as the testimony will justify, and yet, under the circumstances the plaintiffs were entitled to their commission. They introduced the purchaser to the seller, and by that means the sale was made. In *Lloyd vs. Matthews,* 51 N. Y. 124, in a case similar to this one, the court says: "It is sufficient to entitle the broker to compensation that the sale is effected through his agency as its procuring cause and if his communications with the purchaser were the cause or means

of bringing him and the owner together, and the sale resulted in consequence thereof, the broker is entitled to recover."

In *Arrington vs. Cary*, 5 Baxt. (Tenn.) 609, it is said: "When a broker or agent is employed to sell real estate, and produces a person who ultimately becomes a purchaser, he is entitled to his commissions, although the trade may be effected by the owner of the property."

Also, from *Carter vs. Webster*, 79 Ill. 435, we quote a part of the opinion which explains itself: "Plaintiff engaged Bruner to secure a purchaser for defendant's land, and according to the custom that prevails, Bruner induced Gun, another real estate agent, to interest himself to find a buyer for the land. Gun did mention the fact that this property was for sale, to Mr. Mears, and through the information thus obtained, Mr. Mears, sen., went directly to defendant, and bought the property of him. The effect of what plaintiff did was to present to defendant a person who made an offer for the property that he was willing to and did accept. This was all plaintiff undertook to do * * * or all he had to do to earn his commissions."

In *Royster vs. M'Ageveney*, 9 Lea, 148, it is said: "If a broker is employed to sell property, and he first brings the property to the notice of the purchaser, and upon such notice the sale is effected by the owner, the broker is entitled to commissions."

The court in *Tyler vs. Parr*, 52 Mo. 249, speaking by Judge WAGNER, said: "The law is well established that in a suit by a real estate agent for the amount of his commission, it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in the agent's hands, the sale is brought about or procured by his advertisement and exertions, he will be entitled to his commissions." See, also, *Sussdorff vs. Schmidt*, 55 N. Y. 319; *Lincoln vs. McClatchie*, 36 Conn. 136; *Shepherd vs. Hedden*, 29 N. J. L. 334; *Winans vs. Jaques*, 10 Daly, 487; *Goffe vs. Gibson*, 18 Mo. Ap. 1; *Anderson vs. Cox*, 16 Neb. 10; *Bell vs. Kaiser*, 50 Mo. 150; *Williams vs. Leslie*, 111 Ind. 70; *Doonan vs. Ives*, 73 Ga. 295; *Dolan vs. Scanlan*, 57 Cal. 261; *Armstrong vs. Wann*, 29 Minn. 126; Fitch on Real Estate Agency, 119, 120.

The claim of the plaintiffs for commission is not affected because the defendants saw fit to sell the same land for a price less than they gave it to plaintiffs to sell. In this connection, Mrs. Plant testified: "I thought if I could make the sale myself I could sell it cheaper, and would not have to pay commission." The defend-

ants will not be allowed to take advantage of their introduction to the purchaser by the plaintiffs, and reap the benefits of the sale made to him in consequence, and then escape all liability of paying them their commission because they sold the land for a sum less than the price given their agents, where the reduction was made of their own accord. *Stewart vs. Mather*, 32 Wis. 344; *Cock vs. Emmerling*, 22 How. 69; *Woods vs. Stephens*, 46 Mo. 555; *Reynolds vs. Tompkins*, 23 W. Va. 229; *Lincoln vs. McClatchie, supra;* Wharton on Agency and Agents, sec. 329. We recommend that the judgment be affirmed.

Affirmed.

NOTE.—Compare with preceding case, and with *Sibbald vs. Bethlehem Iron Co., ante*, p. 801.

(77 GEORGIA, 64, 4 AM. ST. REP. 72.)

CLARK vs. CUMMING.

(Supreme Court of Georgia, March, 1888.)

Action to recover a balance alleged to be due on a sale of goods. Plaintiffs had judgment below.

Abbott and *Gray*, for the plaintiffs in error.

A. E. Calhoun, for the defendants.

BLANDFORD, J. The main and only question in this case is, whether a broker can bind his principal by a contract made against the express instructions and authority of the principal.

This court holds that he cannot bind his principal under the case put.

A broker is a special agent, and derives his power and authority to bind his principal from the instructions given to him by his principal. Code, secs. 2194, 2196, 2184; Story on Agency, 32; *East India Company vs. Hensley*, 1 Esp. 111, 113; *Rosenstock vs. Tormey*, 32 Md. 169; *Baxter vs. Lamont*, 60 Ill. 237. When definite instructions are given by the principal to the broker to sell goods for him at a certain specified price for a certain time and day only, this will not authorize the broker to contract and sell the same kind of goods for his principal at a different and subsequent time for the same price; his power is limited by and ceases with his

instructions; and this is so, even though it had been usual in the course of dealings between the broker and his principal for the broker to continue to sell at the prices quoted last by the principal. *Rosenstock vs. Tormey*, 32 Md. 169, 179, 180.

The court below decided as we have here held, and the judgment is affirmed.

(LAW REPORTS, 5 EXCHEQUER, 169.)

FAIRLIE vs. FENTON.

(English Court of Exchequer, April, 1870.)

Fairlie, a broker, brought this action to recover for the non-acceptance of cotton sold by him, as a broker, to the defendant. The contract was in the following form: "I have this day sold you on account of," etc., and was signed "Evelyn Fairlie, broker." Verdict for the plaintiff. Motion for a non-suit, on leave reserved.

Brown, Q. C., and *Mellor*, for the rule.

Pollock, Q. C., and *Barnard, contra.*

KELLY, C. B. The numerous cases cited to us show that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as a broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him. Though innumerable contracts of this nature daily take place, yet no instance has occurred within my own recollection, nor has any instance been cited to us, where an action has been brought by a broker describing himself as such in the contract, and not using words which expressly or by necessary implication make him the contracting party. Without further arguing the point, it is enough to refer to this unbroken rule as the settled law upon the subject.

CLEASBY, B. I am of the same opinion. There is no doubt a broker cannot sue; he has no authority to sell in his own name, or to receive the money, and has nothing to do with the goods. This is so laid down in Story on Agency, secs. 28–34, 109. "To use the

brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another, and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. When he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name." Sec. 28. "So a broker has ordinarily no authority *virtute officii*, to receive payment for property sold by him." Sec. 109. The distinction between a broker and an auctioneer has already been pointed out in argument. My only doubt has been whether the use of the words "I have," etc., ought to be held to import a personal participation in the contract, the usual course being departed from; but my opinion is it ought not.

MARTIN, and PIGOTT, BB., concurred.

Rule absolute.

NOTE.—See *Thompson vs. Kelly, ante*, p. 653, and note.

CHAPTER IV.

OF FACTORS.

I.

IMPLIED POWERS OF FACTORS.

(69 ILLINOIS, 155.)

PHILLIPS VS. MOIR.

(Supreme Court of Illinois, September, 1873.)

Action by Moir & Co., distillers, to recover from Phillips & Carmichael, commission merchants, the amount alleged to have been received by them on a sale of plaintiffs' wines. Moir & Co., had made a contract for the future delivery of 200 barrels of wine to one Ames, intending to supply them out of their warehouse, but their warehouse and contents were burned before the wines were called for. Moir & Co. then instructed defendants, if the wines should be called for by Ames before Moir & Co. could make them, to go into the market and buy and deliver them on Moir & Co.'s account. Ames called for 100 barrels before Moir & Co. had made them and Carmichael went into the market and bought them and began to deliver them at Ames' store on the afternoon of the same day. Phillips went twice to the store to get his pay, waiting there some time, but Ames was not there, nor any one except his porter.

About six o'clock, when the wines were substantially all delivered, Phillips went away telling the porter he would leave the wines in his charge and would be there as soon as he came down in the morning. He went there in the morning but the wines were gone and Ames could not be found. It was found that part of the wines had been shipped to Detroit and part were still in the Michigan Central depot. Phillips & Carmichal replevied all of the wines, following up and recovering those sent to Detroit. They sold them then at the market price and put the proceeds in the bank. It appeared, however, that Ames had received from the Michigan Central railroad company bills of lading for the 100 barrels of

wine on the day following their delivery at Ames's store and had procured the discount of drafts, with these bills of lading attached, at the National Bank of Commerce. Phillips & Carmichael were defeated in their replevin suits by the Bank of Commerce and they thereupon paid this bank the money they had received from the sale of the wines after replevying them. Notice of the replevin suits were given to Moir & Co. but they refused to prosecute them.

The evidence showed that it was the universal custom in Chicago, when high wines were sold on 'change on a given day to be delivered on that day, to deliver during the same afternoon to the purchaser, and the next morning the necessary papers, consisting of inspection certificates, government coupons identifying the wines and showing the payment of the government tax, the bill of sale and account, are presented to the purchaser when he is required to pay. If the purchaser requires it, the wines have to be inspected on his premises after delivery. If he does not, then the seller has to furnish the certificate of the government inspection.

The testimony showed Ames to have been in good credit and standing until the 19th of July. On the 18th, before making the delivery, Phillips inquired of three different persons as to the responsibility of Ames, and received a favorable report, and learned that each of the parties was then actually delivering him wines.

Messrs. Goudy & Chandler and *Messrs. Lawrence, Winston, Campbell & Lawrence,* for the appellants.

Mr. C. M. Harris, for the appellees.

Mr. Justice SHELDON delivered the opinion of the court.

The money sued for in this case was not that of the plaintiffs, but belonged to the National Bank of Commerce, as has been established by legal adjudication, made under such circumstances as to be binding upon the plaintiffs. The only ground of action which can be claimed against the defendants is, for the negligent delivery of the high wines to Ames, without collecting the price, and it is objected, that there can be no recovery for such a cause of action under a declaration in assumpsit containing the common counts only as in this case, but that there must be a special count thereon. Passing over this objection, we will consider the question as to the liability of the defendants under any form of declaration which might be framed.

The rule in regard to factors and brokers is familiar, that they are only required to act with reasonable diligence and care in their employment. Story on Agency, sec. 186.

The known usages of trade and business, too, enter into the engagement of the agent, and if he conducts his business according to such usages, he will be exonerated from all responsibility. Id. sec. 96.

It seems impossible on an examination of the evidence in this record, to come to any other just conclusion than that Phillips and Carmichael fully performed the duty arising out of their employment as agents. So far as we can perceive, they used all the diligence and care that a prudent man would have used under like circumstances in the transaction of his own affairs.

In making the delivery to Ames without receiving simultaneous payment, they were justified by the usage of the particular trade or business prevailing in Chicago.

We see no pretext of a ground upon which to charge the appellants with a liability in this case, except the one of a violation of orders. There is some evidence in the record tending to show a disobedience of instructions.

Moir testifies that, at the time he was in Chicago, on his way east, about the 10th of July—when he instructed Carmichael how to act in the event of the wines being called for before Moir & Co.'s wines reached the market—wines had at that time declined from the time the sale had been made, and he insisted upon an increased margin being put up; that it was the understanding of Moir and Wallace that the margin was to be kept good; that, on application to Ames to increase it, the latter said he distinctly understood that he was to put up but $3 as margin, and declined to increase it; that thereupon Moir walked over to where Carmichael was transacting business, and said: "Mr. Carmichael, this man is putting a different construction on the contract from what I think he ought to put. Don't trust a dollar's worth of our property in his hands without getting your pay for it;" that Carmichael gave assurance to witness that he would not. Carmichael positively denies that Moir said anything of the sort.

Phillips swears that, on the same day when Moir was in Chicago on his way east, he said to Moir, in case it was necessary to buy in the wines and deliver them, that there was some little risk in delivering wines; that they did not know Ames at all, never had a transaction with him; to which Moir replied that we must be as careful as possible; that that was about the sum and substance of the conversation. Moir denied this conversation.

Here is not a preponderance of testimony for the plaintiffs to recover upon. The reason, too, assigned by Moir for giving the direction did not truly exist, for the contract, in plain words, only required a margin of $3 per barrel, which had been put up, and there was no just cause for censure or suspicion of Ames on that ground.

But even if Moir did say to Carmichael what the former testifies, we cannot admit that there would be ground for a recovery.

What would have been meant and understood by Moir's direction not to trust a dollar's worth of his property in Ames' hands without getting pay for it? It certainly should not have been taken in its literal meaning, that Moir was to get his pay for each barrel, or each dray load of high wines, as it was delivered. That would be impossible. Phillips and Carmichael had no right to demand payment until they had delivered the wines, had them inspected on the premises, if required by the purchaser, and furnished the inspection certificate and coupons. The article was bulky, and had to be delivered in successive dray loads from the distance of a mile. Phillipps went twice to Ames' store during the afternoon while the delivery was going on, in order to protect Moir & Co's interest, remaining there the second time until about six o'clock, when the wines were nearly all delivered.

Up to this point it cannot be said that Phillips and Carmichael had failed in their duty, or departed from their instructions, if they ever received any. Not meeting with Ames at that time, what was then the duty of Phillips? It would have been well-nigh impossible for him at that time to withdraw the wines from Ames' store and place them elsewhere in safety. But, could he have done so, it would have been imprudent to remove the wines in due regard to Moir & Co's interests, so far as Phillips could then judge. Ames at that time was in good credit, he might claim the right to insist on the established custom in regard to the sale and delivery of high wines. There was nothing in the contract of sale made by Moir & Co. with Ames to take the sale from the operation of the custom.

Phillips could not know but that Ames would require to have the wines inspected on his premises, as he was entitled to have done, by the custom. He was entitled by the custom, to have the certificate of inspection and the government coupons identifying the wines and showing the payment of the tax, delivered to him with

the bill. The custom was not to deliver these papers, and not to pay for the wines, until the morning after their delivery. If then, Phillips, on that night of the 18th, had removed the wines, it would have been, as he might reasonably suppose, at the hazard of discharging Ames from his contract, and of Moir & Co. losing the margins of $600, which they had put up, and their 9 cents per gallon, the difference between the price at which they sold and that at which they had purchased.

The only course for Phillips to take, with a view to protect the interests of Moir, would seem to be the one he did take.

He placed the wines in the care of the porter in the store, to be kept until the next morning, and the next morning he was there for the payment. In the meantime the wines had been abstracted.

The loss was not attributable to the pecuniary condition of Ames, but to the fact that he was a dishonest man.

The special instruction claimed as having been given by Moir as before remarked, could not have been intended to be taken literally. The language of it requires construction, and it must have a reasonable construction.

The usages of a particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent. Story on Agency, sec. 77.

The only reasonable construction to be placed on the language of such instruction, under the circumstances, would seem to be that Phillips & Carmichael were not to give Ames any indulgence, but to insist on prompt payment according to the existing usage and custom; that they were not to trust Ames with the possession of the wines beyond the customary course of delivery, and except to that degree that it was necessary to trust him in order to make a good delivery and enable Moir & Co. to collect their purchase money and save the forfeit of the margins which they had put up. To have required anything more, we incline to think the direction should have been more specific, showing an unmistakable intention to depart from the known usage and custom of the particular trade, and the particular wherein the variation should be. The appellants did not trust the wines to Ames without payment any further than was in strict accordance with the known usage and custom of the business, and than seemed necessary under the circumstances, and under a contract which was of appellee's own making.

We regard the finding of the court below as unwarranted by the evidence, and the judgment must be reversed.

Judgment reversed.

(77 MAINE, 563.)

PINKHAM vs. CROCKER.

(Supreme Judicial Court of Maine, December, 1885.)

Assumpsit on an account annexed for sixteen sacks of wool—two thousand two hundred sixty-eight and one-half pounds at twenty-seven cents a pound—six hundred twelve dollars and fifty cents; also for money had and received.

The wool was sold by the defendant in his own name with other wool belonging to him to the Sebec Woolen Company on sixty days' time and the purchaser failed before the payment was due and paid twenty-five cents on a dollar. The opinion states other material facts.

Chas. P. Stetson and *John F. Robinson,* for the plaintiff.

John Varney, for the defendant.

PETERS, C. J. The defendant, as a factor, no instructions being imposed upon him, sold the plaintiff's wool at the plaintiff's risk, upon credit, the purchaser failing before the debt became due. The defendant exercised due care in taking the risk, if he was justified in so selling the goods. Does the law authorize a factor to sell his principal's goods on credit?

It was held in an early case in this state that a factor has such authority. *Greely vs. Bartlett,* 1 Maine, 172, 10 Am. Dec. 54. It was the doctrine of the Massachusetts court when our own state was a portion of that commonwealth. *Goodenow vs. Tyler,* 7 Mass. 36, 5 Am. Dec. 22. It is the general doctrine. Story on Ag. §§ 60, 110 and cases there cited.

We do not think it necessary for the defendant to show that it is a usage of trade to sell wool upon credit. Of course, if the sale was made in defiance of a usage which forbids a sale on credit, the defense fails. But it is fair to presume that a usage exists which permits such a sale unless the contrary be shown. We know that, as far as most descriptions of goods are concerned, it is not unusual to

sell on credit. The factor often sells his own goods on credit, and it is to be presumed that he is clothed with as much discretion when he sells goods belonging to others. It is not unreasonable to suppose that the principal would have sold the goods on credit had the sale been made by him without the aid of a factor. Should it be necessary, however, to appeal to the evidence for the defendant's justification, we should not hesitate to declare that, in our opinion, such a usage as the defendant invokes is affirmatively proved.

The plaintiff contends that the defendant made himself personally liable for the goods because he was guilty of negligence in not seasonably apprising the plaintiff of the circumstances of the sale, and in not using more diligence than he did use to collect the debt. The evidence does not support the contention. If a factor exposes his principal to risk of loss by any want of information which the principal is entitled to from him, or by any inattention to his principal's interests, he is responsible for all the natural consequences of his neglect. The law requires diligence and a lively interest on his part in his employer's affairs.

But what better action could have been taken than was taken by the defendant after the purchaser failed? His own wool was covered by the same sale. He took the same percentage in settlement with the purchaser that all other creditors received. The plaintiff evidently intended, after the purchaser failed, to cast the loss upon the defendant, if he could, and he seems to have been unwilling to participate in the responsibility of any settlement of the debt either by word or act. The cases cited upon the brief submitted for the plaintiff are not applicable to these facts. The case cited upon the brief for the defense, *Gorman vs. Wheeler*, 10 Gray, 362, is in point.

The plaintiff is entitled to recover, under the money count, the amount which the defendant received from the purchaser on his account.

Defendant defaulted accordingly.

(11 HOWARD, 209.)

WARNER vs. MARTIN.

(Supreme Court of the United States, December, 1850.)

Martin & Franklin consigned tobacco to their factor Esenwein for sale. The latter became financially embarassed and went to Europe, leaving his affairs in charge of his clerk. The latter turned out to Warner, in satisfaction of a claim he had against Esenwein, a large quantity of the tobacco received from Martin & Franklin. Warner sold part of it to Heald, Woodward & Co., who bought in good faith, not knowing where or how Warner got it. The action was by Martin & Franklin for an accounting. Decree accordingly.

Mr. Fallon, for appellants.

Mr. Wharton, for appellees.

WAYNE, J. (After stating the facts.) The exact questions raised by the record are, whether or not the transfer of the tobacco to Warner divested the plaintiff's ownership of it; and whether or not Warner's sale of a part of it to Heald, Woodward & Co., for a full consideration, without any knowledge upon their part of the plaintiff's interest when they bought from Warner, gave to them a property in it.

Warner's account of dealings with Esenwein we believe to be true. In his answer, however, he puts his right to retain the tobacco upon a footing not applicable to it. He says he bought without knowing that Martin & Franklin had any interest in the tobacco, and that he believed Esenwein was the owner. His inference practically was, that he might therefore set off against the price his liability for the notes which he had lent to Esenwein as a debt due by Esenwein to him. This can only be done upon the principle that, where two persons equally innocent are prejudiced by the deceit of a third, the person who has put trust and confidence in the deceiver should be the loser. He discloses in his answer his knowledge of a fact which takes him out of any such relation to the plaintiff. It is his knowledge at the time of the delivery of the tobacco to him, of the failure of Esenwein.

In all of those cases in which it has been ruled that the buyer who, at the time of the sale, knows nothing of the relation between

the factor with whom he deals and the principal by whom that factor has been employed, is protected by the law, in case of a misadventure occurring by the default of the factor, it is admitted that the risk, which a principal runs, through the inadvertence or misconduct of his agent, may be avoided, by the purchaser having notice, at any time before the completion of the purchase or delivery of the goods, of the agent's commission. Peake, 177. Among the instances which the law terms notice enough for such a purpose is the insolvency of the factor known to the buyer. *Eastcott vs. Milward,* 7 Term Rep. 361; Ibid. 366.

Warner says in his answer, that, at the time he made his purchase, "the insolvency of Esenwein was believed." Those are his words, and according to all that class of cases asserting the principle under which his answer puts him, such knowledge was sufficient to entitle the plaintiff to avoid the sale.

Again, a transfer to him, by way of sale, by the clerk of Esenwein, of property trusted to the latter as a factor, could not pass the title or right in it from the real owner.

It made no difference that Caprano had been left to transact Esenwein's business while he was in Europe. A factor cannot delegate his trust to his clerk. The law upon this point is well settled. It has been repeatedly ruled. The first example in the first paragraph of Paley on Agency, upon the "execution of authority," is, if an agent be appointed to sell, he cannot depute the power to a clerk or under agent, notwithstanding any usage of trade, unless by express assent of the principal.

The utmost relaxation of the rule, *Potestas delegata non potest delegare,* in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. *Trueman vs. Loder,* 11 Adolph. & Ell. 589. Or where the usual course of the management of the principal's concerns in the employment of a sub-agent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the sub-agent as the acts of the agent himself. *Blove vs. Sutton,* 3 Meriv. 237; Combes' case, 9 Co. 75-77; Roll. Abr. 330; *Palliser vs. Ord,* Bunb. 166. Lord ELDON, in *Coles vs. Trecothick,* 9 Ves. jr. 236, reprobates the notion, that, if an auctioneer is authorized to sell, all his clerks are, during his absence, in consequence of any such usage in that business.

It was ruled by the Master of the Rolls in *Blove vs. Sutton,* 3

Meriv. 237, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of an authorized agent, signed by his clerk and not by the agent himself, was not a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and that it was made under the immediate direction of, the authorized agent, and in the usual course of the business of his office. A factor cannot delegate his employment to another, so as to raise a privity between that other and his principal. *Solly vs. Rathbone*, 2 Maule & Selw. 299; *Cockran vs. Irlam*, Ibid. 301. The reason of the rule in all these mercantile agencies is, that it is a trust and confidence reposed in the ability and integrity of the person authorized. An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the peculiar transaction or the usage of trade, has not the power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The agency is a personal trust for a ministerial purpose, and cannot be delegated, for the principal employs the agent from the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing. 2 Kent's Comm. 633.

No usage of trade anywhere permits a factor to delegate to his clerk the commission trusted to himself. In this case, there was a transfer of the plaintiff's property to Warner, by a clerk of their factor. He knew when it was done that he was giving their property to a creditor of his employer in payment of his debt; and both himself and the purchaser knew that Esenwein was in failing circumstances, or, as Warner expresses it, "that his insolvency was believed." It must be admitted that such a transfer passed no property in the thing transferred, and that it may be reclaimed by the owner, as well from any person to whom it has been sold by the first buyer as from himself. It is the case of property tortiously taken from the owner or his agent, without any fault of the owner, and as such cannot take away his right to it.

On either of the grounds already mentioned, the plaintiff would be entitled to recover from the defendants in this case. But there is a third, which shall be stated in connection with other points respecting principals and factors, which it will not be out of place to notice. A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously

pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. *Paterson vs. Tash,* Str. 1178; *Maans vs. Henderson,* 1 East, 337; *Newson vs. Thornton,* 6 East, 17; 2 Smith, 207; *McCombie vs. Davies,* 6 East, 538, 7 East, 5; *Daubigney vs. Duval,* 5 T. R. 604; 1 Maule & Selw. 140, 147; 2 Stark. 539; *Guichard vs. Morgan,* 4 Moore, 36; 2 Brod. & Bingh. 639; 2 Ves. Jr. 213.

When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged (*Daubigney vs. Duval,* 5 T. R. 604); or without any demand of such goods (6 East, 538; 12 Mod. 514); and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor (*Martini vs. Coles,* 1 Maule & Selw. 140), unless, indeed, where the principal has held forth the agent as the principal (6 Maule & Selw. 147). But a factor who has a lien on the goods of his principal may deliver them over to a third person, as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case, the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged. *Hartop vs. Hoare,* Stra. 1187; *Daubigney vs. Duval,* 5 T. R. 604; 6 East, 538; 7 East, 5; Chitty's Com. Law, 193. So a sale upon credit, instead of being for ready money, under a good authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer, and the thing sold may be recovered in an action of trover. Paley, Principal and Agent, 109; 12 Mod. 514. Under any of these irregular transfers, courts of equity (as is now being done in this case) will compel the holder to give an account of the property he holds.

But it was said, though a factor may not pledge the merchandise of his principal as a security for his debt, he may sell to his creditor in payment of an antecedent debt. No case can be found affirming such a doctrine.

It is a misconception, arising from the misapplication of correct principles to a case not belonging to any one of them. The power of the factor to make such a sale, and the right of the creditor to retain the property, has been erroneously put upon its being the usual course of business between factors to make a set-off of bal-

ances as they may exist in favor of one or the other of them against the price of subsequent purchases in their dealings. The difference between such a practice and a sale for an antecedent debt must be obvious to every one when it is stated. In the one the mutual dealing between mercantile persons who buy and sell on their own account, and who also sell upon commission for others, is according to the well-known usage of trade. Its convenience requires that such a practice shall be permitted. But it must be remembered it is an allowance for the convenience of trade, and for a readier settlement of accounts between factors for their purchases from each other in that character. It does not, however, in any instance, bind a principal in the transfer of merchandise, if there has been a departure from the usages of trade, or a violation of any principle regulating the obligations and rights of principal and factor.

Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. See *Berry vs. Williamson*, 8 Howard, 495.

It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor.

It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to

sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the *dation en payement* of the civil law as it prevails in Louisana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt.

Courts of law and courts of equity, in a proper case before either, will look at such a transaction as one in which both principal and creditor had been deceived by the factor, so far as the deceit is concerned; but it will also be remembered in favor of the principal, that the creditor has acquired the principal's property from his factor, with the creditor's knowledge, out of the usual course of trade, and will reinstate him in his former relation to his debtor, rather than that the creditor should be permitted to keep the property of another, who is altogether without fault, in payment of his debt.

As to a factor's power to bind his principal by a disposition of his goods, the common law rule is, "that, to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been either in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions," or that he had not such notice as the law deems equivalent to raise that presumption. "The reason of this is clear, for unless the transaction took place *bona fide* in market overt (in which case a peculiar rule of law in England steps in for its protection), an agent selling without express authority must, that his acts may be supported, have sold under an implied one. But an implied one thereby always empowers the person authorized to act in the usual course of his

employment; consequently, if he sells in an unusual mode, he could have no implied authority to support his act, and, as he had no express one, his sale of course falls to the ground." Smith's Mercantile Law, 111, 112.

The defendants are not within the compendious summary just stated. There has been a transfer of property, which was consigned to a factor for sale, by his clerk, to a creditor of his employer, who knew his debtor to be in failing circumstances, just as well as the clerk himself did; and of property, too, which the clerk knew to be the property of the plaintiff, and which the creditor bargained for knowingly out of the usual course of trade. Nor should we omit to say that Esenwein's opinion and disapproval of what had been done by his clerk with his principal's tobacco are significantly disclosed by the fact, that, upon his return from Europe, he redeemed so much of it as had been assigned to Mr. Conolly by his clerk in payment of a debt, and sold and remitted the proceeds to his principals.

By the common law, the transfer of the plaintiff's tobacco to Warner cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward & Co. Heald, Woodward & Co. are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them. But Warner is answerable to them for that amount, and he is replaced for the whole as a creditor of Esenwien, just as he was before the transaction occurred. Affirmed.

(126 MASSACHUSETTS, 183.)

DOLAN vs. THOMPSON.

(Supreme Judicial Court of Massachusetts, January, 1879.)

Action of tort for malicious prosecution. Plaintiff had consigned goods to the defendants, who were factors, under an agreement by which the latter were to advance him money from time to time, charge him interest thereon at a certain rate, sell the goods at the market price, charge a certain commission for selling, and after deducting advances, interest and commissions, to pay him the balance, or if, upon settlement, after all the goods were sold, he

owed them, he was to pay it. Defendants made large advances to the plaintiff on account of goods not sold, and after several months sued him to recover and attached his goods. They afterwards discontinued the action upon selling goods enough to reimburse them. This was the malicious prosecution complained of. Judgment below for defendants.

I. W. Richardson and *J. W. Keith*, for the plaintiff.

R. M. Morse, Jr., and *J. H. Hardy*, for the defendants.

SOULE, J. The plaintiff cannot maintain his action unless the evidence would justify a finding by the jury that the suit which is charged to have been malicious was instituted without probable cause by the defendants. The plaintiff contends that by the terms of the contract between the parties the defendants were to wait until all the goods consigned to them had been sold, before calling on him for repayment of moneys advanced to him; and if this were so, it would be plain that there was no cause of action against him. But we do not so interpret the contract. The agreement was oral, and, as testified to, contains only a specification of certain of the rights and duties of principal and factor, and does not in terms, nor by implication, take away from the factor any rights which he would have had but for the agreement. When it is intended to change, in any particular, the well established rights between such parties, it must be done by an agreement which clearly points to that result; otherwise, it will be presumed that their dealings are governed by the rules of law ordinarily applicable to dealings of that nature. Accordingly, the defendants, having advanced largely to the plaintiff on account of goods not sold, and which had been on hand for several months, were entitled to recover of the plaintiff the balance of account in their favor when the suit was begun. They had the right to look to the goods in their hands as security, and the further right, in the absence of an agreement to the contrary, to sue for the amount due them. *Beckwith vs. Sibley*, 11 Pick. (Mass.) 482; *Upham vs. Lefavour*, 11 Metc. (Mass.) 174.

Exceptions overruled.

(103 UNITED STATES, 352.)

INSURANCE COMPANY vs. KIGER.

(United States Supreme Court, October, 1880.)

On the 19th of March, 1877, Basil G. Kiger, a planter in Mississippi, consigned to Aiken & Watt, his factors in New Orleans, one hundred and ninety-six bales of cotton, with instructions not to sell, but to hold for further directions and better prices. The cotton reached New Orleans March 21, and was stored by Aiken & Watt in the cotton-press of Saml. Boyd & Co. Aiken & Watt had no pecuniary interest whatever in the cotton, and Kiger, the consignor, was not indebted to them. On the contrary, they were largely indebted to him. On the 26th of March, Aiken & Watt borrowed of the Mechanics' and Traders' Insurance Co. $4,500, for which they gave their notes to the company, payable in forty days, at eight per cent. interest, secured by a cotton-press receipt of Boyd & Co., of which the following is a copy:

"NEW ORLEANS, March 26, 1877.

"Received from Aiken & Watt the following described property, to-wit: one hundred bales cotton, marked [K], ex. Pargoud, March 21, 1877. Shipper's press. (Printed indorsement in the body of the receipt:) 'the within cotton will not be delivered except on the return of this receipt to the press, properly indorsed.' Deliverable to the Mechanics' and Traders' Ins. Co. or order.

"SAM. BOYD & Co."

Indorsement on the back of the receipt printed:

"Deliver to ——— or order the within described property. The above order is accepted, and the property is transferred to ———

"SAM. BOYD & Co."

Afterwards, on the 3d of April, Aiken & Watt borrowed $2,500 more from the company, and gave a similar press receipt for ninety-six bales as security. The cotton embraced in these receipts was that which belonged to Kiger.

Before the maturity of these notes Aiken & Watt failed. The notes were protested for non-payment when due, and the makers were adjudicated bankrupts, June 16, 1877.

On the 18th of April, 1877, Kiger brought this suit against Boyd & Co., to recover the possession of his cotton. It was delivered to

him under the writ which was issued, he giving bond according to law to return it in case of judgment against him to that effect. Afterward the insurance company was called into the suit by Boyd & Co., and made a defendant by Kiger. The insurance company answered, setting up its claim to the property. Upon the trial, the foregoing facts appearing, the jury were instructed to return a verdict in his favor against the company.

To reverse the judgment rendered on that verdict, the case is now here by writ of error.

Mr. Thomas Hunton, for the plaintiff in error.

Mr. Joseph P. Hornor, Mr. W. S. Benedict, and *Mr. Thomas J. Semmes, contra.*

Mr. Chief Justice WAITE, after stating the facts, delivered the opinion of the court.

There are two questions in this case: 1. Whether the insurance company can hold the cotton as against Kiger; and 2, whether, if it cannot, Boyd & Co. are liable for the amount for which their receipts were pledged.

1. As to Kiger. Before the act of 1876 it was settled by numerous decisions in Louisiana that a factor could not pledge for his own debts the property of his principal. *Stetson vs. Gurney,* 17 La. 166; *Hadwin vs. Fisk,* 1 La. Ann. 43–74; *Miller vs. Schneider & Zuberbier,* 19 Id. 300; *Young vs. Scott & Cage* and *Cavaroc,* 25 Id. 313. The act of 1876 does not, as it seems to us, materially enlarge this power, so far as the facts of this case are concerned. It makes warehouse receipts the representatives of property in store, and provides for their use to borrow money on; but the implication is clear that their use in that way by a factor for more than the value of his interest in the property would be wrongful and invalid against the owner. This we do not understand to be disputed by the counsel for the plaintiff in error. His claim is that there was in this case no pledge, but, "as the effect of the stipulation in the press receipts," "an absolute transfer of the legal title to the insurance company by parties in possession having the absolute control of the property, and the security was thus taken to enable the insurance company to sell the cotton and reimburse themselves if the debt was not paid."

The transaction between the parties was certainly not a sale, and in the answer of the company it is distinctly stated that the cotton

was delivered into the possession of the company to be held as security for the payment of the notes given for the money borrowed. Undoubtedly the possession of the receipts was equivalent to the possession of the property, but the title which the company acquired was such as grew out of its contract with the factors. That clearly was a pledge and nothing more. There was, first, the cotton; second, the debt for the money borrowed; and, third, the delivery of the property into the possession of the creditor, to be held as security for the debt. These are all the elements of a pledge, and fix the rights of the parties. Aikin & Watt were the pledgors, but as they were only factors and had no interest in the property as against Kiger, the owner, their pledge was wrongful and invalid as to him. The pledge was by a factor of the property of his principal, in which he had no interest whatever, as security for his own debt.

2. As to Boyd & Co. They were simply warehousemen. Their duty under the law was not to issue receipts until they had the property actually in store, and not to deliver the property until the receipts were surrendered for cancellation. They did have the property in store when they gave the receipts, and as soon as it was taken from them by judicial process they notified the insurance company, and upon that notice the company is now here asserting its title. This is a substantial compliance with their obligation not to deliver without a surrender of the receipt. There is no pretence of fraud or collusion, and we think it would be a surprise to warehousemen to be told, that when they issued their receipts for property in store they became not only responsible as custodians of the property, but guarantors of the title to the assignees of their receipts. Such a rule would make it necessary for a warehouseman, before giving a receipt, not only to ascertain whether he had the property actually in store, but whether the title of the bailor was valid and unincumbered. Certainly this could not have been in contemplation when warehouse receipts were made by statute negotiable and to some extent evidence of ownership. The duty of the warehouseman is performed when he gets the property into his own possession before he issues the receipt and transfers that possession when demanded to the lawful holder of the receipt.

In this case the liability of Boyd & Co. is just what it would have been if the company had put the cotton in store and taken a receipt to its own order. The fact that Aiken & Watt originally stored the property is a matter of no importance so far as Boyd &

Co. are concerned. The receipt in the hands of the company represented the cotton stored by Aiken & Watt, and gave the company the same rights it would have had if the cotton, instead of the receipt, had been handed over. The company got by the receipt such interest in the cotton as Aiken & Watt could by their pledge convey, and that is all Boyd & Co. agreed to deliver on the return of their receipt. Boyd & Co. cannot, as against the company, say they never had the cotton, or that they did not promise to deliver it on the return of their receipt by the lawful holder. They received the actual possession of the property from Aiken & Watt, and that possession they agreed to deliver to the insurance company when called on. This, as has just been seen, they have in legal effect done, and the rights of the parties in this case are to be determined precisely as they would be if the company had got the cotton from Boyd & Co., on the surrender of the receipts, and had afterwards been sued by Kiger for its possession.

Judgment affirmed.

NOTE.—See *Allen vs. St. Louis Bank*, 120 U. S. 20.

II.

DUTY TO OBEY INSTRUCTIONS.[1]

(27 FEDERAL REPORTER, 273.)

TALCOTT vs. CHEW.

(United States Circuit Court, Southern District of Georgia, November, 1885.)

Plaintiff sued to recover upon an account due to him as factor from defendants. Defense *inter alia*, damages incurred by the alleged failure of the plaintiff to sell 640 bales of cotton for future delivery. The case was referred to an auditor who reported in plaintiff's favor, for a part only of his claim. Both parties excepted.

Frank H. Miller, and *Chisolm & Erwin*, for plaintiff.

H. Clay Foster, and *Lester & Ravenel*, for defendants.

[1] See, also, *Phillips vs. Moir*, *ante*, 671.

SPEER, J. (After stating the facts.) The plaintiff excepts because the auditor declined to give judgment for the full amount of the account stated; because of a variance between the plea of set-off and the proof submitted thereunder; and because the credits were allowed. The material grounds of exception made by defendants are: *First*, that the auditor erred in finding anything, because the account sued on was not an account stated; and that the account was not proven by any competent or sufficient proof; *Second*, that the auditor erred in not finding for the defendants; that the auditor should have disallowed all commissions because the plaintiff was an agent employed to sell the cottons of the defendants, that he took several lots of the same on his own account or sold to himself and thus forfeited his commissions as a factor; *Third*, that the auditor erred in finding that the plaintiff was not obliged, by his contract with the defendants, when instructed so to do, to sell future contracts against the lot of 640 bales of cotton which had been already received on consignment by the plaintiff; *Fourth*, and that the auditor also erred in finding that the defendants, by their subsequent dealings, had ratified this refusal to sell for future delivery.

On the hearing it was agreed by counsel that the issues involved should be determined by the court without the intervention of a jury.

I do not regard the exceptions of the plaintiff as material. It is true that the plaintiff's claim must properly be considered an account stated. On September 20, 1881, the account sued on, being a general account current, was inclosed in a letter from the plaintiff to the defendants with the request that the latter would remit the balance of $3,028.44. On the twenty-second of September, 1881, the defendants acknowledged the receipt of the statement, and in reply wrote that they were very much pressed with business, but in a few days would look over the statement carefully and give their views on the matter. On the third of October, 1881, the plaintiff drew a sight draft for the amount of the balance, and on the same day, through his agent, wrote again: "We have nothing from you in regard to your account sales for cotton." On the fourteenth of October, the plaintiff again complained that he had received no statement of errors in the account, and on the 20th the plaintiff telegraphed defendants to send statements of any objections they have to the account. It appears from the evidence

that communication by mail could be had between Augusta and New York in two days. See *Wiggins vs. Burkham,* 10 Wall. (U. S.) 129.

An account rendered and not objected to within a reasonable time, is to be regarded as admitted by the party charged as *prima facie,* correct. The principle which lies at the foundation of evidence of this kind is that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. The inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it; as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined. It will not do, however, for a commission merchant to say that his business prevents him from looking over an account contracted in the course of that business; nor is it the custom of merchants who intend to pay an account to say: "We will look over it in a few days, and then give you our views on it." Unless objected to within a reasonable time (and what constitutes such reasonable time is a question of law,) an account rendered becomes an account stated, and cannot be impeached except for fraud or mistake. *Oil Co. vs. Van Etten,* 107 U. S. 334; 1 Story Eq. sec. 526; *Lockwood vs. Thorne,* 11 N. Y. 173, 62 Am. Dec. 81; s. c. 18 N. Y. 288; *Stenton vs. Jerome,* 54 N. Y. 484.

The supreme court of the United States, on this general subject, have held that the failure of a party receiving a letter to reply within a reasonable time after he receives it was to raise a presumption that he approved of what had been done, so far as the letter informed him; and, in the absence of anything to rebut that presumption, he was to be regarded as having consented thereto. *Feild vs. Farrington,* 10 Wall. 141. The supreme court of Georgia have adopted this ruling, (*McLendon vs. Wilson,* 52 Ga. 48,) and reaffirmed it. (*Bray vs. Gunn,* 53 Ga. 148).

A stated account, however, is not conclusive; but when it is admitted in evidence the burden of showing its incorrectness is thrown on the other party. He may prove fraud, omission, and mistake, and in these respects he is in no wise concluded by the admissions implied from his silence after it was rendered. *Wiggins vs. Burkham,* 10 Wall. 132; *Perkins vs. Hart,* 11 Wheat. (U. S.) 256. It follows, therefore, that the auditor was justified in giving

to the account stated the weight of evidence *prima facie*. He was also justified in correcting an error. *Bray vs. Gunn, supra.* I am of the opinion, therefore, that the auditor had the evidence before him to support his finding; nor do I think that his reductions of the plaintiff's demand were improper; nor that the defendant can justly complain of the plaintiff's refusal to hold his cotton to warrant him in making sales for future delivery.

The plaintiff furnished the money with which to buy the cotton, and while, ordinarily, factors are generally bound to obey all orders of their principal, yet when they have made large advances, or incurred expenses on account of consignments, the principal cannot, by any subsequent orders, control their right to sell at such a time as, in the exercise of a sound discretion and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor; they acting, of course, in good faith, and with reasonable skill. *Feild vs. Farrington*, 10 Wall. 144.

It is true that a factor or other agent who is guilty of fraud or gross negligence in the conduct of his principal's business forfeits all claims to commissions or other compensation for his services (*Fordyce vs. Pepper*, 16 Fed. Rep. 516); and, ordinarily, a factor who takes commissions from his principal, who employs him to sell, would violate his contract, should he also take commissions from the person to whom he sells (*Dos Passos*, Brok. 224; *Baston vs. Clifford*, 68 Ill. 67, 18 Am. Rep. 549; *Raisin vs. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Lynch vs. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Scribner vs. Collar*, 40 Mich. 375, 29 Am. Rep. 541); nor could an agent employed to sell be himself the purchaser (Code, Ga. 2186.)

Here, however, the plaintiff was not strictly a factor. It is very clear from the evidence that he was a general commission merchant; that his principal dealings were in dry goods; that he dealt largely with spinning mills and spinners, supplying them with cotton, which he frequently sold to them on time. He was neither a cotton factor, a cotton broker, nor a member of a cotton exchange in New York city; and it was clearly understood by the defendants that because of the peculiar facilities that the plaintiff had to dispose of the cotton to spinners, they would pay him a commission; and they not only understood that he was receiving commissions from the spinners, but they tacitly acquiesced.

The double agency was therefore clearly understood by both par-

ties. The plaintiff furnished the means, not only to pay for the cotton, but frequently to give time to the spinners who bought from him. This was legitimate. *Rice vs. Wood,* 113 Mass. 133, 18 Am. Rep. 459 *(ante,* p. 12); *Scribner vs. Collar, supra; Fritz vs. Finnerty,* 10 Cent. L. Jour. 487. In fact, all the cotton purchased was the property of the plaintiff, and the defendants profits were to be made by the use of his money; and it is not to be supposed that he would sell the cotton for less than its market value.

On the review of the whole case, I am satisfied that there is no error in the report of the auditor. It is therefore approved, and judgment directed for the amount of his finding.

NOTE.—See *Bell vs. McConnell, ante,* p. 538; *Vinton vs. Baldwin, ante,* p. 664; *Rice vs. Wood, ante,* p. 12, as to double commissions.

(84 ALABAMA, 512.)

LEHMAN vs. PRITCHETT.

(Supreme Court of Alabama, June, 1888.)

Action by Lucy B. Pritchett against Lehman, Durr & Co., as commission merchants and warehousemen, to recover for the loss of five bales of cotton which defendants kept on hand, after being instructed to sell, until they were destroyed by fire. Judgment for plaintiff. Defendants appeal.

Tompkins, Landon & Troy, for appellants.

Watts & Son, contra.

CLOPTON, J., delivered the opinion of the court:

Appellee seeks by the action, which is brought against appellants, as commission merchants and warehousemen, to recover for the loss of five bales of cotton which they failed to sell in a reasonable time after having been so instructed, and which they kept on hand until they were destroyed by fire. The rulings of the court, in charging the jury, raise the question whether the defendants are liable for the value of the cotton if they failed to sell it after receiving instructions a sufficient time to enable them to sell before the cotton was burned, though the warehouse receipts were not sent to them, and they did not demand them, nor notify

plaintiff that they would not sell without them. In October, 1885, tenants of plaintiff stored in her name the cotton in controversy in the Alabama warehouse, and took three separate receipts for the same, which were turned over to her agent. During the same season the plaintiff shipped and consigned for sale to the defendants, as commission merchants, fourteen other bales, the receipts for which were kept by them, and were in their possession when the instructions to sell were given. This cotton the defendants sold. A fair and just consideration of the instructions of the court given and refused, require us to assume that defendants were directed to sell the cotton in dispute, and also that the warehouse receipts were not delivered to them. The business, duties, and liabilities of factors and commission merchants are substantially the same, the terms being ordinarily used interchangeably. A factor, or commission merchant, as generally defined, is an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for reward, usually a commission. The features which mainly distinguish a factor from a broker are, the former is entrusted with the possession, disposal and control of the property, and may sell in his own name, binding the principal, and the latter does not usually have possession, disposal, and control, and should sell in the name of his principal. While, as a general rule, a commission merchant is bound to obey the instructions of his principal, the right to give instructions to sell, and the correlative duty to obey, depend on the existence, in fact and in law, of the relation from which the right and duty arise to the particular party by whom the instructions are given. The relation is only created when the property is consigned or received, or is placed at the disposal or under the control of the commission merchant to be sold. Whenever he receives the property without special directions as to the time, mode, or price, the duty is devolved to use due diligence to sell in a reasonable time; but the duty is not devolved until he receives such possession and power of disposal and control as will enable him to make an effectual sale—to deliver possession, and to pass title.

In *Perkins vs. State*, 50 Ala. 154, it is said: "A commission merchant we understand to be one who receives goods, chattels, or merchandise for sale or exchange. Possession of the thing to be sold or exchanged, and authority to sell or exchange or otherwise dispose of it, for a compensation to be paid by the owner, or derived from the disposition, are essential to his character."

It follows that, if the cotton had been stored in plaintiff's name in a warehouse with which defendants had no connection, the instructions to sell would have imposed no duty to obey until the warehouse receipts were delivered, so as to authorize them to demand and receive possession—constructive possession. It is not contended that the cotton was consigned to the defendants, or that it was in their possession; but it is insisted that they had possession, and power to dispose and control it, by reason of their connection with the warehouse in which it was stored. The contention is rested on the following facts: The defendants were commission merchants doing business as partners under the firm name of Lehman, Durr & Co. The partners also owned individually the Alabama warehouse, and carried on the warehouse business as partners under the firm name of "The Alabama Warehouse Company." The business and transactions of two partnerships were kept separate and distinct, but daily reports of the cotton stored in the warehouse were made to Lehman, Durr & Co. The defendants were sued as partners composing the latter firm. In a suit against them as such partners, a recovery cannot be had, founded on a breach of duty and their liability as warehousemen. Each partnership has a distinctive personality, and, for all the purposes of suit, must be regarded the same as if the individual members were different persons. As at common law a bailee may safely restore the subject of bailment, or account for the proceeds thereof to the bailor, when not notified of an adverse right or claim by a stranger, it may be that the defendants having received instructions to sell from the bailor in one of their partnership capacities, and having possession and control of the cotton as bailees in the other, it would have been, independent of statute, their duty to obey the instructions. This question, however, we do not decide. The statutes intervene to qualify and restrict the common law right and duty of warehousemen. They provide that warehousemen, on receiving property for safe keeping, shall give a receipt therefor to the person from whom received. Such receipt is made transferable by indorsement, unless the words "not negotiable" are plainly written or stamped thereon; and, if these words are not plainly written or stamped on the receipt, the warehouseman is prohibited to deliver the property except on the delivery and cancellation of the receipt, unless it has been lost or destroyed. Code 1886, §§ 1174–1178, Without the delivery and cancellation of the receipts, the Alabama Warehouse Company was

without right or authority to deliver the cotton to the plaintiff, and equally to, or on the order of, Lehman, Durr & Co., as her agents and commission merchants. The cotton not being consigned to Lehman, Durr & Co., and the receipts not having been sent or delivered, they had no power to acquire possession, management, disposal, or control of the cotton, and, if they had sold it, could not have safely delivered it to the vendee. Even if the warehouse business had been carried on by Lehman, Durr & Co., as a branch and part of their partnership business, and not by a different partnership and under a different name, they could not, as warehousemen, have rightly and safely delivered the cotton except on delivery and cancellation of the receipts. They might, at their option, have sold it, and incurred the risk of the receipts having been transferred, and of liability to the transferee; but the law does not devolve the duty to sell, in contravention of its provisions, until the receipts are delivered to them as commission merchants. To fasten on them a liability for a breach of their duty as commission merchants there must be something which is an equivalent of a consignment or delivery of the cotton for sale.

The court also instructed the jury that the defendants, if liable, were liable for the value of the cotton. The warehouse, with the cotton, was burned March 10, 1886. It is undisputed that the fire was accidental, and was not caused by any negligence of the defendants, or of the Alabama Warehouse Company. There are classes of cases in which it was ruled that the defendant was liable for the value of the property, though it may have been destroyed by some subsequent accident with which the act of the defendant had no legal connection. In such cases, so far as our examination has extended, the liability was rested on the character in which the defendant was acting, or some act done, by which responsibility for the value of the property was incurred before its destruction; such as that he was a common carrier, and an insurer against such accidents, as in *Railroad Co. vs. McGuire*, 79 Ala. 395, or he had interfered with the property so as to constitute his act a conversion, or so as to authorize the plaintiff to elect to treat the property as the defendant's, and claim payment therefor. If it be conceded that it was the duty of the defendants to sell the cotton in a reasonable time after receiving instructions, its subsequent loss by fire cannot be regarded as the natural and proximate consequence of delay in selling, "according to the usual course of things." The burning of the cotton was an accidental or collateral injury, not

usually following as the result of such delay. If the defendants were in duty bound as commission merchants to sell the cotton in a reasonable time, and they failed to do so, they would be liable for any injury naturally resulting therefrom, but not for injury suffered from an extraordinary or fortuitous cause, having no relation to the delay except that it was cotemporaneous. *Daughtery vs. Telegraph Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Railroad Co. vs. Lockart*, 79 Ala. 315; *Burton vs. Holley*, 29 Ala. 318, 65 Am. Dec. 401.

Counsel cite and rely on *Pattison vs. Wallace*, 1 Stew. 48, where it was held that a ginner who received cotton under an agreement to pick and bale it in preference to all other cotton, but who ginned the cotton of other persons, leaving plaintiff's cotton unginned, and the gin house, with the cotton, was subsequently burned, was liable for the value of the cotton, though the burning was without fault on his part. Of that case it may be said that it stands almost, if not quite, alone, is opposed by the overwhelming weight of authority, and has been departed from in principle by this court in all the later cases. It does not seem to have been much considered, and the principle therein asserted is assumed without citation of authority or argument to sustain it. We cannot extend it to other or similar cases, in which there is no fraud, bad faith, or negligence causing the injury.

In *Ashe vs. De Rossett*, 5 Jones (N. C.), 299, 72 Am. Dec. 552, the owner of a rice mill agreed with a planter that, if the latter would bring his rice to the mill, it should have priority in being beat, according to a turn to which the owner was entitled. It was not beat according to the agreement, but was kept in the mill, and before being beat the mill and rice were consumed by fire. PEARSON, J., says: "Its being burnt was an accident unlooked for and unforeseen, and can in no sense be considered as having been caused by the fact that it was not beat in the turn promised by the defendant's intestate. Consequently the damages were too remote."

In *Daniels vs. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264, the defendant contracted to tow the plaintiff's barge by a steam tug from Bay City, Mich., to Buffalo, N. Y. The voyage was voluntarily suspended and delayed after having been commenced, and after being resumed, a storm was encountered, by which the barge was lost. It was held "that the defendants, by the mere fact of the delay, did not become responsible for the loss of the barge, although the delay was unnecessary and unreasonable, and although,

as the event proved, the barge, but for the delay, would probably have been safely towed to its place of destination. In such case the storm must be regarded as the proximate, and the delay as only the remote cause of the loss."

The following cases are cited as sustaining and illustrating the application of this rule of remoteness of damages: *Denny vs. Railroad Co.*, 13 Gray, 481, 74 Am. Dec. 645; *Morrison vs. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Railroad Co. vs. Reeves*, 10 Wall. 176; *Jones vs. Gilmore*, 91 Pa. St. 310; *Smith vs. Smith*, 45 Vt. 433; *Railroad Co. vs. Burrows*, 33 Mich. 6; *Wallrath vs. Whittekind*, 26 Kan. 482.

In the present case the burning of the cotton was the result of an accidental or collateral injury, between which and the delay in selling there was no necessary or natural connection. The fire must be regarded as the proximate, and the delay as the remote, cause of the loss of the cotton. The damages, for which the jury were instructed the defendants would be liable, were too remote.

Reversed and remanded.

(73 GEORGIA, 418.)

HATCHER vs. COMER.

(Supreme Court of Georgia, September, 1884.)

Plaintiffs sued defendants on a note on open account. Defendants introduced evidence to show that they obtained a loan from plaintiffs and shipped them two lots of cotton; the first lot they instructed plaintiffs to sample and put on the market, and pay the note with the proceeds; they wrote plaintiffs to hold second lot for instructions; both of these instructions were violated; the cotton was sold when the price had depreciated, and the proceeds were credited on the account. Defendants claimed that the note was paid, and also claimed a recoupment for the difference between what the cotton brought and what it would have brought if the instructions had been followed.

Plaintiffs asserted that they had sold the first lot of cotton as soon as they could, and credited the proceeds on the account. They admitted that they sold the second lot contrary to instruc-

tions, but insisted that, having advanced money on the cotton, they had a right to sell, such being the custom in Savannah, where they lived. They also showed promises to pay made by defendants. The jury found for the plaintiffs.

S. B. Hatcher, E. G. Simmons, W. A. Little, for plaintiffs in error.

Denmark & Adams, J. M. Dupree, W. H. Fish, W. L. S. Gignilliat, for defendants.

BLANDFORD, J. Comer & Company brought their action against Hatcher & Baldwin upon a promissory note for $1,038.90, dated May 30, 1878, and due October the 15th thereafter; also upon an account for $70.83. The defendants pleaded payment of the note and recoupment as to the whole.

Upon the trial of the case, defendants introduced a letter in evidence from themselves to the plaintiffs, dated 17th October, 1878, in which they stated that they had shipped to plaintiffs forty-five bales of cotton, and instructed plaintiffs to sample and put the cotton on the market, and with the proceeds to pay their note. They also showed from plaintiffs' books that the cotton was sold and realized some thirteen hundred dollars, which was placed as a credit on the account of defendants, which account consisted of several items besides the note sued on. Defendants introduced evidence to show that if the cotton had been sold according to instructions contained in their letter, it would have realized eighteen hundred dollars, more than sufficient to have paid their note and the account.

Plaintiffs in error insist here that, under these facts, the note is paid off, and the damage which they sustained by reason of the failure of the defendants in error to obey their instructions was more than sufficient to extinguish the account, and that this should be allowed them by way of recoupment.

The defendants in error contend that, by the custom of merchants which obtains in Savanah, as they had advanced plaintiffs in error on the cotton, they were not bound to obey the instructions of the plaintiffs in error, but might hold this cotton and sell in their discretion.

"Peculiar confidence being reposed in a factor, he may, in the absence of instructions, exercise his discretion, according to the general usages of the trade." Code, sec. 2111. "The primary obligation of an agent or factor, whose authority is limited by

instructions, is to adhere faithfully to those instructions, for if he unnecessarily exceed his commission, or risk his principal's effects without authority, he renders himself responsible for the consequences of his act; and if loss ensue, it furnishes no defense to him that he intended to benefit his principal." 12 Ga. 205.

We take it that these principles thus enunciated are the law of this state, and whatever particular customs there may be prevailing in the city of Savanah, they must give way to the law. If the instructions were given by plaintiffs in error to the defendants, as insisted on by them, and in this the record sufficiently sustains them, then the court below should have instructed the jury as they prayed, so as to give them the benefit of the law thus laid down, and it was error to have refused the request on this point.

Whatever damage the plaintiffs in error may have sustained by the failure of the defendants in error to sell the cotton as instructed, they had the right to recoup against the claim of defendants in error; and the court erred in refusing the requests of plaintiffs in error on this point.

If it be true, as contended for by the plaintiffs in error, that they shipped to defendants in error forty-five bales of cotton, with directions to sell the cotton and pay the note sued on, and if defendants in error did sell the cotton, and it brought enough money to pay off the note, then this was an extinguishment of this debt, and the defendants in error could not recover upon it. The court should have so instructed the jury, and it was error to have refused the instruction. Code, sec. 2869. *Pritchard vs. Comer*, 71 Ga. 15; 51 Ga., 507; 57 Id., 450; 34 Id. 558; 27 Id. 47; 30 Id. 857; 45 Id. 565.

The principles here announced will we think, be sufficient to control this case upon another trial.

Judgment reversed.

(36 MINNESOTA, 214, 1 AM. ST. REP. 663.)

DAVIS vs. KOBE.

(Supreme Court of Minnesota, December, 1886.)

Action to recover a balance of account for disbursements, charges, commissions, and advances on wheat consigned by the defendant

to the plaintiff at Duluth, and which had been sold by the latter, some of it against the defendant's instructions. The plaintiff had a verdict, and the defendant appealed from an order refusing a new trial. Other facts are stated in the opinion.

Bruckart and *Reynolds*, for the appellant.

W. W. Billson, for the respondent.

By court, DICKINSON, J. A factor or commission merchant, to whom wheat is consigned for storage in an elevator, not a private warehouse, and for sale, may store it in a mass in a bin with other wheat of the same grade and quality, in the absence of instructions from the consignor to the contrary. It has become a matter of common knowledge that such is the customary manner of storing wheat in our general commercial elevators, and of this the courts should not affect ignorance, but should take judicial notice without proof. The fact that the wheat is of the grade known as "condemned" creates no exception to the rule. There was therefore no error in that part of the charge of the court referred to in the appellant's first assignment.

The court did not err in instructing the jury that if the consignor shipped this grain to his factor at Duluth to be sold there, and the grade at Duluth was not as good as at the place of shipment, the consignor must bear the loss, in the absence of special instructions to his factor. This was only saying, in other words, that the factor, in executing his agency by selling in the Duluth market, would not be responsible to his principal in respect to the grades established at that place. The principal assumed the risk of that when he selected his market.

The court properly instructed the jury that the factor was justified in selling the wheat, notwithstanding the request of the principal to hold it longer. Ordinarily, the agent would be bound to obey the instructions of his principal as to the time of selling. But it was shown that the factor had made large advances to his principal upon this wheat; that the grain was of doubtful sufficiency as security for what was due to the factor on account thereof; that the factor had repeatedly demanded repayment of his advances, or security for the same, as a condition of his continuing to hold the wheat, notifying his principal that he should sell if his demand was not complied with; and that, although reasonable notice had been given, the principal had neglected to reimburse or secure the agent. Under such circumstances, the factor had a right, acting

in good faith, and with reasonable discretion, with regard both to the reimbursement of himself and the interest of his principal, to sell the property. *Brown vs. McGran*, 14 Pet. 479; *Feild vs. Farrington*, 10 Wall. 141; *Parker vs. Brancker*, 22 Pick. 40.

From what has already been said it follows that the charge was correct, that if there were no special instructions as to a separate storage of the grain, and if it sold for a fair price, the verdict should be for plaintiff. In other words, the factor being justified in selling and having sold for a fair price, the principal is not, because of such sale, entitled to recover against the factor.

Order affirmed.

III.

LIABILITY TO ACCOUNT TO PRINCIPAL.

(24 WENDELL, 203.)

COOLEY vs. BETTS.

(Supreme Court of New York, May, 1840.)

Betts sued Cooley and Bangs in the common pleas, and declared on the common counts in assumpsit for goods sold, money had and received, etc. The declaration also contained a special count that in consideration that the plaintiff would deliver divers goods, wares and merchandise to the defendants, to be sold by them for him, they undertook to sell the same, and to render a true and just account of the sale and of the proceeds when they should be thereunto afterwards requested. The plaintiff then averred a delivery of the goods to the defendants, a sale by them, and a request to account and pay over, and for breach alleged that the defendants had not rendered an account of the goods or of the moneys arising from the sale. There was a second special count, similar to the first. The defendants pleaded non-assumpsit as to all but $28.98, and as to that a tender. The tender was admitted in the replication.

On the trial in the Common Pleas the plaintiff proved that in March, 1837, he sent a quantity of books which cost $419.16, to the defendants, to be sold at auction, and that the defendants during the same month sold the books. Upon this proof he rested.

The action was commenced in October, 1837. The defendants moved for a non-suit on the grounds: 1. That no demand of an account or request for a settlement had been shown; and, 2. That there was no proof for the amount for which the goods sold. The motion was denied, and the defendants excepted. In the further progress of the trial, the defendants showed that the proceeds of the plaintiff's goods on the sale were $210.07. A verdict having passed against the defendants, they sued out a writ of error.

Willis Hall, (Attorney General,) for the plaintiffs in error.

R. Lockwood, for the defendants in error.

By the court, BRONSON, J. In the absence of any express stipulation between the parties, the law will imply a promise by a factor, bailiff or other agent to render an account to his principal; but it seems not to be fully settled whether the agent will be deemed in default after the lapse of what may be considered a reasonable time, or whether he must be plainly put in the wrong, by showing a demand before suit brought.

So far as relates to the two special counts, it is not necessary to decide this question, for the plaintiff has not declared on a promise to account within a reasonable time, but on a promise to account on request; and a special request is alleged in stating the breach. The plaintiff has put his own construction upon the contract, and if we should think him mistaken, and that he might have recovered in another form of declaring, I do not see how we can help him out of the difficulty. In the language of BEST, C. J., in *Elborn vs. Upjohn,* 1 Carr. & Payne, 572, the plaintiff has tied himself down to a particular averment, which he is bound to prove.

But as the declaration also contains the money counts, the question is presented in another form. In relation to those counts, I may remark that it does not appear whether the factors were to sell for cash or on credit, nor whether they have received the money. But if we assume that the sale was for cash, and that the money was paid, I still think the plaintiff cannot recover without showing a demand, or instructions to remit. The action is founded on a supposed breach of trust, which must be made out affirmatively before the agent can be charged.

In Buller's N. P. 148, it is said that where *indebitatus assumpsit* is brought for money received *ad computandum,* it is necessary to prove a misapplication, or breach of trust; for if a man receives money to a special purpose, it is not to be demanded of the party as

a duty till he have neglected it, or refused to apply it according to the trust. He cites *Poulter vs. Cornwall*, 1 Salk. 9, where the money was received *ad computandum*, and on motion in arrest of judgment, the court said it must be intended, after verdict, that there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor.

In *Ferris vs. Paris and others*, 10 Johns. R. 285, the defendants were foreign factors, and had rendered an account of the goods which had been consigned to them for sale. It was held that an action against them for the proceeds of the goods would not lie, until they were shown to be in default, by proving a demand, or an improper disregard of instructions to remit the money. In *Taylor vs. Bates*, 5 Cowen, 376, it was held that an action would not lie against an attorney for money collected for his client, until after a demand, or a request to remit. WOODWORTH, J., said, the contrary doctrine would be in opposition to the nature of the defendant's trust, as well as against justice and good faith. The same point was adjudged in *Rathbun vs. Ingalls*, 7 Wendell, 320, where the plaintiff was non-suited, although several years had elapsed between the time of collecting the money and the bringing of the action. In *Topham vs. Braddick*, 1 Taunt. 572, the defendant was a foreign factor, see p. 104, and it was held that no action would lie for not rendering an account of the goods consigned to him for sale, until there had been a demand by the principal; and, consequently, that the statute of limitations did not commence running when the goods were sold, but on a demand made.

In Massachusetts, the rule seems to be that a request is not necessary in the case of a foreign factor, on account of the great inconvenience and embarrassment to trade which would follow, if the merchant was obliged to send abroad to make a demand; and, in general, the factor to whom goods have been consigned for sale, is liable to an action without showing a request, if he neglect to render an account within a reasonable time; but if he has rendered an account at the proper time, an action for the proceeds of the goods will not lie without a demand, unless it appears from the course of business that the factor was to remit without instructions. *Clark vs. Moody*, 17 Mass. R. 145; *Langley vs. Sturtevant*, 7 Pick. 214; *Dodge vs. Perkins*, 9 Id. 368–387. I do not understand these cases as conflicting with the doctrine, that this action for money had and received to the plaintiff's use cannot be maintained without showing either a demand, or instructions to remit; or, that, according

to the course of this business, it was the duty of the defendants to remit without instructions, neither of which facts were proved in this case.

Whether the distinction taken in the Massachusetts cases in relation to foreign factors rests on a solid foundation, we need not now consider; for it does not appear in this case but that both parties reside in the same state. But I cannot forbear to remark that the inconvenience of sending abroad to make a demand cannot alter the nature of the factor's trust; and if other agents are not in default until after a request, I can see no principle which will subject the foreign factor to an action without a demand. In *Ferris vs. Paris*, 10 Johns. R. 285, and in *Topham vs. Braddick*, 1 Taunt. 572, the defendants were foreign factors, and in both cases a demand by the principal was held to be necessary.

I am not disposed to deny that there may be a sound distinction between an action for not accounting, and an action for not paying over the proceeds of the goods. It is the duty of an agent to render an account of his transactions to his principal within a reasonable time, and when it appears that he has neglected to do so, an action for not accounting may, perhaps, be maintained without a demand. But here there was no evidence to show that the defendants had not rendered an account. And besides, the action is for not paying over the proceeds of the goods—the special counts being laid out of the case—and in such an action it is necessary to show a demand, or instructions to remit.

After a great lapse of time, and when nothing appears to the contrary, it may be presumed not only that there has been a demand by the principal, but that an account has been rendered and settled by the agent. *Topham vs. Braddick*, 1 Taunt. 572. But that doctrine obviously proves too much for the plaintiff's case. In the absence of any direct evidence on the subject, there is, at the least, as much reason for presuming that the defendants have faithfully discharged their trust as there is for presuming them guilty of a culpable neglect of duty; and if we presume a demand by the plaintiff, we must presume also an account and payment of the proceeds by the defendants.

The defendants offered a set-off for other goods purchased by the plaintiff at the same auction, which was called a "trade's sale;" but the case is defective on this point, in not stating that any question was made and exception taken after the proof came out

that a part of those goods had been delivered. On another trial, it may be difficult for the plaintiff to distinguish the case from that of *Mills vs. Hunt*, 17 Wendell, 333. But the judgment must be reversed on the other ground.

Judgment reversed.

NOTE.—See *Jett vs. Hempstead, ante*, p. 496.

(33 MARYLAND, 412, 3 AM. REP. 190.)

LEWIS BROTHERS & CO. vs. BREHME.

(Court of Appeals of Maryland, October, 1870.)

Defendant Brehme was the factor of plaintiffs and sold goods for them to one Akers, and guaranteed the payment in gold or its equivalent. Akers paid Brehme and the latter deposited the money in bank, and two days later bought a gold draft on a New York bank, payable to his own order, for the amount and also an additional amount which he owed plaintiffs, and indorsed the draft to plaintiffs and sent it to them at Philadelphia. Plaintiffs received it the next day and at once sent it to New York for collection. Here it was dishonored, of which fact plaintiffs were notified, and they at once gave notice to Brehme. The drawing bank had failed. Brehme endeavored to obtain payment from it, and not succeeding was made a preferred creditor in an assignment subsequently made by the bank. This action was brought to recover the amount from Brehme. Judgment for defendant and plaintiffs appealed.

Wm. F. Frick, for appellants.

Wm. A. Fisher and *Charles Marshall*, for appellees.

ALVEY, J. It is conceded in this case that the defendant was the agent of the plaintiffs for the sale of goods, and that, in addition to the commission allowed the defendant as ordinary agent, an additional commission was agreed to be allowed, and was actually allowed, for and in consideration of the defendant's guaranty of payment of all bills of goods purchased of the plaintiffs by a certain customer, who was, through the agency of the defend-

ant, induced to deal with the plaintiffs, merchants in Philadelphia, and such additional commission was to be paid whether the purchases were made by the particular customer directly of the plaintiffs, or through the defendant as their agent. The customer having purchased goods of the plaintiffs, and paid for them to the defendant, the agent, and the money having been lost in the manner disclosed in the evidence, and stated in the prayers of the respective parties, the question is, upon whom is that loss to fall?

It is insisted on the part of the plaintiffs that the defendant, being an agent, acting under a *del credere* commission, is bound to pay, not conditionally, but absolutely, as if he were himself the vendee of the goods; and that, consequently, he did not discharge his liability by the purchase and transmission of the gold draft of the 27th of April, 1866. And even if the liability of the defendant, by reason of the *del credere* commission, be not maintained to the extent contended for, still, the plaintiffs insist that as ordinary agent, whose duty it was to remit funds to his principal, the defendant having procured the draft payable to his own order, and indorsed it to the plaintiffs without excluding recourse, is under all the circumstances attending the transaction, liable as indorser, the drawer having failed, and the draft meeting with dishonor.

On the other hand, the defendant contends that his relation to the plaintiffs was not that of a *del credere* agent or factor strictly speaking; but that if he be so regarded, the guaranty, in consideration of the commission, only extends to the payment of the money for the goods by the vendee, and not to its safe transmission to the vendor; and that, consequently, the guaranty was gratified and discharged when the money was paid by the purchaser to the defendant as the plaintiffs' agent. He also contends that he is not liable as indorser of the draft transmitted, because of the relation of principal and agent existing at the time between the plaintiffs and himself, in reference to which the draft was purchased, and that, acting for the convenience of the plaintiffs, he can only be held responsible for good faith and ordinary dilligence.

These positions of the parties were sought to be maintained by them at the trial in the court below, and with that view they propounded prayers for instruction to the jury; but the court rejecting those of the plaintiffs, and granting those offered by the defendant, the plaintiffs have brought those rulings to this court for review, and whether they be correct or otherwise, according to our judgment, will appear in the sequel of this opinion.

We cannot resist the conclusion that the defendant was, at the time of the transaction involved in this controversy, strictly a *del credere* agent of the plaintiffs; although the nature and extent of the obligations imposed upon such an agent has been variously stated, and, in regard to it, down even to the present time, no little conflict will be found to exist among judges and authors of the highest repute.

On the one hand there are those who maintain that an agent *del credere* for the sale of goods makes himself absolutely and in the first instance liable to his principal for the price of the goods sold; while on the other hand it has been strongly maintained that such an agent only incurs a secondary responsibility, that of mere surety, whereby he can be required to pay only in the event of failure on the part of the principal debtor. And some of the authorities have gone to the extreme of maintaining that the undertaking of the agent, under a *del credere* commission, is a mere guaranty of the debt of another, and, therefore, within the statute of frauds. Which of these positions is correct depends to a great extent upon the state of the authorities, the question never having been finally adjudicated in this State.

Whenever an agent, in consideration of additional commission, such as was agreed to be allowed in this case, guaranties to his principal the payment of debts that become due through his agency, he is said to act under a *del credere* commission. What, then, is the nature and extent of this guaranty? In *Grove vs. Dubois*, 1 T. R. 112, a case of a policy broker, Lord MANSFIELD answered this question in very plain and unqualified terms when he said, "It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal for his benefit, to resort to him as collateral security. But the broker is liable at all events." In this Mr. Justice BULLER concurred, and said that he had known many actions to have been brought against brokers with a commission *del credere*, and that he had never heard any inquiry made in such cases, whether there had been a previous demand upon the underwriter and a refusal; and he declared that such was not the practice. Thus showing, according to the opinions of these great judges, that the obligation of such undertaking was primary and absolute in its character, and that the agent was regarded as standing in the relation to his principal of an original debtor.

Ten years after the case of *Grove vs. Dubois*, the case of *Mackenzie vs. Scott*, 6 Bro. P. C. 280, occurred in the house of lords, on an appeal from the court of sessions in Scotland. That case was very analogous in its circumstances to the one before us. There, a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill for the amount, payable to his, the factor's, own order, on a house in London. This banker's bill the factor indorsed and transmitted to his principal, who got the same accepted. The acceptors and drawer having failed before payment, it was held, according to the head note of the case, that the factor was answerable for the amount of the bill, being personally liable under his commission *del credere*, to satisfy his principal the price of the goods sold.

It was insisted, in that case, as it has been in this, that the *del credere* obligation extended only to guaranteeing the payment of the price of the goods by the vendee, and that the remittance of the money by the factor was a transaction entirely different and distinct. But, if the uniform interpretation of that case be correct (there being no reason assigned for the judgment given), the the argument in that respect did not avail; and, in view of the law as it has been announced in *Grove vs. Dubois*, it is not difficult to perceive upon what ground that decision was based. And afterwards, in 1803, the same general proposition was again pointedly asserted as the law of England in the case of *Houghton vs. Matthews*, 3 Bos. & Pull. 489.

By these decisions the law was regarded as settled in England, until about the year 1816; and all the text-writers, and authors of the elementary treatises upon the subject of commercial contracts before that time laid it down, as the unquestionable law, that an agent, acting under a commission *del credere*, was bound to his principal in the first instance and as an original debtor. The law will be found so stated by Livermore, in his work on Agency, 409, 410; Paley on Agency, 40; Comyn on Contracts, vol. 1, 253; and Chitty in his work on Common Law, vol. 3, 222.

But it is said that the cases to which we have referred do not now announce the law as accepted in England, and we are referred to the case of *Morris vs. Cleasby*, 4 Maule & Selw. 566, decided in 1816, and the cases following on its authority, to show how the rule has been qualified if not entirely changed.

It is true, in the case of *Morris vs. Cleasby*, Lord ELLENBOROUGH

did express a decided dissent from the principle announced in the previous decisions, both as to the nature and scope of the *del credere* obligation. He said that the guarantor, in consideration of the commission, is only to answer for the solvency of the vendee, and to pay the money if the vendee does not; and that, on the failure of the vendee, the agent is to stand in his place and make his default good, thus clearly placing the agent in the position of mere surety to the purchaser of the goods. And if such be the true nature and character of the contract, seeing that it is entirely collateral and secondary, it is difficult to perceive how it can escape the operation of the statute of frauds. Be that, however, as it may, the decision of Lord ELLENBOROUGH was sanctioned by the case of *Peele vs. Northcote,* 7 Taunt. 478, and also impliedly sanctioned by the case of *Gall vs. Comber,* 7 Taunt. 558, in the common pleas. And from the time of these last decisions until very recently, all the treatises on commercial contracts have stated the law in accordance with the opinion of Lord ELLENBOROUGH, taking the doctrine of Lord MANSFIELD to have been overruled. It is so stated in Chitty on Contracts; Russell on the Law Relating to Factors and Brokers; Smith's Commercial Law, and in other works treating of the subject.

Nor has there been uniformity of decision on the subject in the courts of this country, though we think the decided weight of authority is in support of the doctrine as announced in *Grove vs. Dubois.* In the case of *Thompson vs. Perkins,* 3 Mason C. C. 232, before Judge STORY, in 1823, the principle of *Grove vs. Dubois* was repudiated as being incorrect, and that of *Morris vs. Cleasby* sanctioned; though the facts of the case do not appear to have required a distinct ruling upon the particular question now presented. It was an action of assumpsit by the principal against the assignee of the factor *del credere* who had sold the goods of his principal and taken negotiable notes, payable on time, in his own name, for the amount of sales; and afterward, and before the notes became due, the factor failed, and assigned the notes to his assignee for the benefit of his creditors, and the assignee afterward receiving the money due on the notes, it was held that the principal was entitled to recover the money so received from the assignee, subject to a deduction of the amount of the lien of the factor for his commissions and charges.

Upon such state of facts, it is clear the right to recover was equally the result of the doctrine of Lord MANSFIELD as that of

Lord Ellenborough. All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods; or to pursue his goods, or the notes taken for them, into the hands of third parties, precisely as if no *del credere* contract existed. And though such right in the principal would seem to consist only with a collateral undertaking by the agent, yet, in the contract *del credere,* being *sui generis,* it is held in nowise to change the original and independent character of the agent's undertaking to his principal.

In the case of *Swan vs. Nesmith,* 7 Pick. 220, 19 Am. Dec. 282 occuring a few years after the case in 3 Mason, the supreme court of Massachusetts decided that the legal effect of a commission *del credere* was to make the agent liable at all events for the proceeds of the sale, so that he might be charged in *indebitatus assumpsit,* as for goods sold to him. There the contract was admitted to be original and not collateral, and therefore not within the statute of frauds; and the necessary conclusion is, that the court intended fully to sanction the principal of *Grove vs. Dubois,* to which, and the case of *Mackenzie vs. Scott,* they refer for the definition of the nature of the commission *del credere.* And so in New York, the same principle is established, as will be seen by reference to *Wolff vs. Koppel,* 5 Hill, 458, and same case on appeal, 2 Denio, 368, 43 Am. Dec. 75, and *Sherwood vs. Stone,* 14 N. Y. 267.

The two last cases, being in the court of last resort, fully approve and adopt, so far as we can discover from the opinions delivered, the principle of the case of *Grove vs. Dubois* and *Mackenzie vs. Scott.* Judge Story, however, in his work on Agency, section 215, adopting his own view of the law as found in *Thompson vs. Perkins,* supported by *Morris vs. Cleasby,* and the cases in the common pleas, says, that the true engagement of the agent *del credere* is merely to pay the debt, if it is not punctually discharged by the buyer. That, in legal effect, he warrants or guarantees the debt; and thus he stands more in the character of a surety for the debt than as a debtor. And the principle is so stated in other American treatises. But, with all due deference to the high authority of Judge Story, we think the decided weight of authority is against his position.

In England the question has been recently under discussion and re-examination, the result of which is quite at variance with the doctrine laid down in *Morris vs. Cleasby.* In *Couturier vs. Has-*

tie, 8 Exch. 39, the action was brought by the principal against his factor who, on commission *del credere*, had sold a cargo of corn, and the purchaser refusing to comply with the contract on insufficient grounds, and afterwards becoming bankrupt, the question was whether the factor was liable for the non-fulfillment of the contract, by reason of his *del credere* commission, there being no guarantee in writing; and the court held the factor liable, not regarding the undertaking as one simply to pay the debt of another, within the 4th section of the statute of frauds; and the decision in *Wolff vs. Koppel*, 5 Hill, 458, was referred to and adopted as containing sound law upon the subject. And in the more recent case of *Wickham vs. Wickham*, 2 Kay & John. 478, Sir Wm. Page WOOD, then the vice-chancellor, and at present the lord chancellor of England, in referring to the case of *Couturier vs. Hastie*, as authority, said:

"When I look at the whole of that case, and consider the reasons given by the judges in delivering their judgments, though given very cautiously and guardedly, I cannot but conclude that they considered that an agent entering into contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the person whose agency he undertook; that the agreement so entered into by him was not a simple guarantee, but a distinct and positive undertaking on his part, on which he would become primarily liable. Otherwise, I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the statute of frauds."

Supposing this to be the correct conclusion deducible from the present state of the authorities, of which we have no doubt, the contract being distinct and positive, rendering the agent primarily liable, it necessarily follows that the agent stands in no such relation to his principal as that of mere surety for the price of the goods sold. His relation to his principal is that of debtor as well as agent; and being so, the legal consequences of the debtor relation must follow. Indeed, it was conceded in the case of *Leverick vs. Meigs*, 1 Cow. 645, where the liability of such an agent was attempted to be restricted, that if by the engagement the agent became a debtor absolutely, as if he were himself the purchaser, he would be bound for the remittance of the money, as well as for its payment by the buyer. "This arises from the general principle, that the debtor is bound to make payment to his creditor, and consequently, if he remits a bill which turns out of

no avail, it is no payment. It does not discharge a precedent debt, unless it be so expressly agreed between the parties." (1 Salk. 124; 2 Johns. Cas. 441; *Glenn vs. Smith*, 2 Gill & Johns. 493, 20 Am. Dec. 452); or unless the creditor parts with the bill, or is guilty of laches, to the prejudice of the debtor, in not presenting it for acceptance or payment in due time.

Of course, the agent, acting under a commission *del credere*, where the goods have been sold on an authorized credit, cannot be required to account to his principal before the expiration of the credit given to the buyer. And if the money which comes into his hands be remitted under special instructions from the principal, then it will be at the risk of the latter, provided the instructions are observed with proper caution and diligence on the part of the agent. But, in this case, it is not pretended that there were any special instructions in regard to the manner of remitting the money received by the defendant. The remittance therefore was at his risk, as it would be of any other debtor remitting funds to discharge a debt due by him.

Such being our view in regard to the liability of the defendant as an agent, acting under a commission *del credere*, we are of opinion that there was error committed by the court below in refusing to grant the first prayer of the plaintiffs, which was intended to present the case as within the principle of *Grove vs. Dubois* and *Mackenzie vs. Scott*, and particularly the latter, to which this case bears a strong analogy.

But as it has been earnestly contended in argument that the contract *del credere* only extends to the payment of the price of the goods, and not to the remittance of the money to the principal, and the court below having so instructed the jury, let us examine the case briefly upon that supposition, in order to determine whether the defendant be not liable, as indorser of the gold draft transmitted to the plaintiff.

The defendant, upon collecting the amount due from Akers, placed the money in his own account with his bankers, and purchased of them the gold draft, that was afterward dishonored, by a check on his account. This draft he caused to be made payable to his own order, without reference to his character as agent, and after indorsing it to the plaintiffs, or their order, it was transmitted to them to pay, not only the price of the goods sold to Akers, but a balance due from the defendant himself. The draft proving worthless, and having been purchased without special directions,

what is the liability of the defendant by reason of his unqualified indorsement?

Judge STORY, in his work on Agency, section 157, states the rule as an unqualified one, that an agent, though known as such, who indorses a bill or note generally, makes himself personally responsible; "for, in such a case, although he is a known agent, the making, or accepting, or indorsing of an instrument, is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal." And for this proposition, as stated, he cites many respectable authorities. So Chitty, in his work on Bills, on page 46, states the same general principle, and says: "If a person employed by the plaintiff to purchase bills for him, obtain them payable to himself and indorses them generally, he will be liable upon that indorsement, even to his own employer, although he had no guarantee commission;" and the court in deciding one of the cases referred to, observed that the defendant might have specially indorsed the bill *sans recours*, and not having thought fit to do so, he was personally liable. And for other authorities, supporting the same general proposition, see Smith on Mercantile Law, 164; Russell on Brokers and Factors, 263, 264; Parsons on Notes and Bills, 102.

Notwithstanding, however, the rule is thus generally and unqualifiedly stated, we think, on the more recent authorities, it is not to be applied, as between the principal and agent themselves, without some limitation. The indorsement, of course, if unqualified, is to be taken as importing *prima facie* liability on the part of the agent. He should be allowed to show, however, as matter of defense, that it was not the intention that he should be personally charged by his indorsement, and if there be no intention to create personal liability, none will exist as between himself and his principal. Whether such intention exists will, in all cases, depend upon the circumstances of the transaction. But, as was said by Mr. Chief Justice TILGHMAN, in *Mills vs. O'Hara*, 1 S. & R. 32, the circumstances should be clear and strong, to take off the presumption which arises from the indorsement. See the case of *Castrique vs. Battigieg*, 10 E. F. Moore 94, before the privy council.

Such being the law, the next question is, has the liability of the defendant been fixed by proper evidence of due demand and notice?

No direct proof of demand and notice was offered at the trial.

In the absence of such evidence, the liability was sought to be fixed by reason of the conduct and declarations of the defendant subsequently to the protest of the draft, The plaintiff's second prayer enumerates the facts that were supposed to have fixed the defendant's responsibility as indorser, and whether they are sufficient for that purpose is the question to be decided.

If, in point of fact, there had been no demand and notice of dishonor, or insufficient demand and notice, we think this second prayer defective, because it does not submit to the jury to find whether the defendant was fully informed, at the time of the promise and other conduct relied on, of all the facts and circumstances of the neglect to make demand and to give the notice. The promise and other circumstances stated in this prayer would certainly be sufficient to charge the defendant as indorser, if he possessed full knowledge at the time. Without such knowledge, however, his promise or acknowledgment would not bind him. It is therefore essential in this aspect of the case that the fact of knowledge be found by the jury, in addition to the fact of the defendant's treating the debt as his own and promising to pay it to the plaintiffs. *Beck vs. Thompson,* 4 H. & J. 531; 1 Parsons on Notes and Bills, 595, and the authorities there cited.

But if the party is sought to be charged on his indorsement and his promise or assumption be used as evidence of the previous demand and notice, a different principle applies. In such case, any promise to pay, or admission made by the indorser that he continues liable, subsequent to the dishonor, is good evidence upon which to found a presumption that everything has been properly done to render him liable. This is a principle now well established. As in the case of *Lundie vs. Robertson,* 7 East, 231, which was an action by an indorsee against an indorser, and the only evidence of notice of dishonor being the promise of the defendant, Lord Ellenborough said: "When a man, against whom there is a demand, promises to pay it, for the necessary facilitating of business between man and man, every thing must be presumed against him. It was therefore to be presumed *prima facie,* from the promise so made, that the bill had been presented for payment in due time and dishonored, and that due notice had been given of it to the defendant."

And so in the case *Hicks vs. Beaufort,* 4 Bing. (N. C.) 229, where the question was similar to that in *Lundie vs. Robertson,* Tindall, C. J., said: "The cases go on this point only: that if, after the dishonor of the bill, the drawer distinctly promises to pay,

that is evidence from which it may be inferred he had received notice of the dishonor, because men are not prone to make admissions against themselves; and, therefore, when the drawer promises to pay, it is to be presumed he does so because the acceptor has refused."

This presumption, however, is one of fact for the jury, and not an absolute legal conclusion to be drawn by the court. It is *prima facie* only, and liable to be rebutted. 4 Bing. (N. C.) 229; *Booth vs. Jocobs*, 3 Nev. & Man. 351; *Picken vs. Graham*, 1 Cr. & Mee. 728; *Brownell vs. Bonney*, 1 Q. B. 39.

If no demand had been made and notice given, the defendant would be entitled to prove the omission, and the further fact that his promise or acknowledgment had been made without knowledge of the plaintiff's neglect in this respect, and thus rebut the presumption. The jury should be required to find from the evidence whether due demand and notice had occurred, as ground of the plaintiff's right to recover. This being so, the plaintiff's second prayer is also erroneous in not requiring due demand and notice to be found by the jury. Instead of making the right of recovery depend upon the legal conclusion to be drawn from the facts stated, the jury should have been instructed that it was competent to them, from the facts enumerated, if found to exist, to infer and conclude, as matter of fact, that due demand had been made and notice of dishonor given, and if they should so find, that then the plaintiffs were entitled to recover. It follows, therefore, that the plaintiff's second prayer was properly rejected by the court below.

It results necessarily from what has been said that the defendant's first prayer was erroneous, and should not have been granted. It assumed that the contract resulting from the *del credere* commission was discharged in the payment of the money by Akers to the defendant. This, as we have seen, was an erroneous view of the law. It also follows, from what we have said in reference to the plaintiff's second prayer, that the second prayer of the defendant should not have been granted. It assumed that the defendant could not be held liable, after the receipt of the money from Akers, either by virtue of the commission *del credere*, or his indorsement of the draft, if he used ordinary diligence in transmitting the money to the plaintiffs. This, as we have shown, is not maintainable. The judgment below will be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

IV.

FACTOR'S LIEN.

(60 WISCONSIN, 406, 50 AM. REP. 378.)

McGRAFT vs. RUGEE.

(Supreme Court of Wisconsin, Jannary, 1884.)

Replevin. The opinion shows the points. The plaintiff had judgment below.

Cotzhausen, Sylvester, Schreiber & Jones, for appellant.

Johnson, Rietbrock & Halsey, and *L. N. Keating,* for respondent.

CASSODAY, J. An agent employed to sell or to purchase and sell, goods or other personal property intrusted to his possession, by or for his principal, for a compensation, commonly called factorage or commission, may properly be regarded as a factor. Story, Agency, §§ 33-34*a*; Edwards, Factors, § 1; Wharton, Agency, § 735. Here the duties, powers and compensation of the factors and their relation to their principals were originally regulated by agreement. True, there were some departures after the business had continued for a while, but there is nothing to indicate any change as to the title of the property, or the measure or source of compensation.

Undoubtedly a factor is entitled to retain goods in his possession as such until his advances, expenses and commissions are paid, and this right is not limited to charges on the particular consignment of goods, but covers a general balance on the accounts between the factor and the principal, so far as concerns the business of factorage. Whart. Agency, § 767; Edwards, Factors, §§ 71, 72; Story Agency, § 376; *Matthews vs. Menedger,* 2 McLean, 145; *Bryce vs. Brooks,* 26 Wend. 374; *Kruger vs. Wilcox,* 1 Amb. 252; *Jordan vs. James,* 5 Ohio, 99; *Weed vs. Adams,* 37 Conn. 378. The statute of this State in this respect would seem to be in confirmation of the common law. R. S., §3345.

But where the general balance on the accounts of the factorage is largely against the factor and in favor of the principal the former can have no lien upon the property in his possession, for he has no enforceable claim. *Godfrey vs. Furzo,* 3 P. Wms. 185;

Zinck vs. Walker, 2 Wm. Bl. 1154; *Hollingworth vs. Tooke*, 2 H. Bl. 501; *Walker vs. Birch*, 6 Term, 258; *Weed vs. Adams, supra*; *Jordan vs. James, supra; Enoch vs. Wehrkamp*, 3 Bosw. 398; *Beebe vs. Mead*, 33 N. Y. 587. In such case the factor's right of retention and sale is merely to reimburse himself for the balance, his due on the general account of the factorage. *Brown vs. McGran*, 14 Pet. 479; Overton Liens, § 105.

Neither can a factor who is indebted to his principal on account of previous sales acquire a particular lien upon goods subsequently sent to him for sale, for expenses incurred on account of them, unless such expenses exceed the amount of his indebtedness. Edwards, Factors, § 72; *Enoch vs. Wehrkamp, supra*. The lien of an agent and factor on the goods of his principal for specific expenses does not exist when the general balance of account is against him. *Ibid.* We must therefore hold that where a factor is largely indebted to his principal on account of the factorage and thereupon voluntarily makes advances in the business not exceeding such indebtedness, such advances, being made for and in behalf of his principal, must be deemed to have been so made by the factor in liquidation of his own indebtedness *pro tanto*.

Here by special agreement, the commissions of the factors were limited to the net profits of the business. There is however nothing to indicate that there were any such profits, but the reverse. The court moreover found that at the time of the levy, the factors were largely indebted to the plaintiffs upon the general account of their business as factors, after crediting them with all advances made by them or either of them in the business. We cannot upon the evidence disturb this finding. The fact stands confessed, that the general balance against the factors and in favor of the plaintiffs was upwards of $26,000.

We are asked to assume that this wide discrepancy was owing to losses for which the factors were in no way at fault, and hence in no way responsible, merely because the plaintiffs, after the commencement of this action, turned over to the factors the outstanding credits and accounts of the business, amounting it is said to $2,500. The true value of such credits and accounts does not appear, but assuming that they were worth what is claimed, yet that fact is insufficient to change the character of the general balance against the factors. If this large balance against the factors was owing to losses for which they were not responsible, but which should have fallen upon the plaintiffs, then the burden of proving

such facts was upon the defendants. They have failed to make such proof, and we are not at liberty to supply it by mere inferences, and remote at that.

Had the evidence shown a general balance due the factors, still it would have been a grave question whether it could have been reached by an execution against the factors being levied upon the lumber, shingles, lath, etc., in their possession as such factors. Whart. Agency, § 757 and cases there cited; *U. S. vs. Villalonga*, 23 Wall. 42; *Jordan vs. James*, 5 Ohio, 99. These authorities in effect hold that the factor's right, although sometimes called a special property, yet is never regarded as a general ownership. It is liable to be defeated at any time by the principal paying advances made and liabilities incurred and reclaiming possession of the property. The factor's right, at most, is nothing more than the ownership of a debt secured by a lien or charge upon the property in his possession. It would seem, therefore, that such debt can at least be more appropriately reached by some other process. But it is unnecessary here to determine the question, and hence we reserve it for future consideration.

By the court. The judgment of the circuit court is affirmed.

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